(13)

No. 96-542-CFX Title: Walter McMillian, Petitioner
v.
Monroe County, Alabama

Docketed: October 7, 1996 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Oct 7 1996	Petition for writ of certiorari filed. (Response due November 6, 1996)
	Nov 6 1996	Brief of respondent Monroe County, Alabama in opposition filed.
	Nov 20 1996	DISTRIBUTED. December 6, 1996
	Nov 20 1996	Reply brief of petitioner Walter McMillian filed.
	Dec 6 1996	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, January 21, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel of or before 3 p.m., Thursday, February 20, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 7, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT March 18, 1997. **********
	Jan 10 1997	Motion of petitioner to dispense with printing the joint appendix filed.
	Jan 21 1997	Motion of petitioner to dispense with printing the joint appendix GRANTED.
	Jan 21 1997	Brief of petitioner Walter McMillian filed.
	Jan 21 1997	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Jan 21 1997	Brief amicus curiae of United States filed.
	Jan 29 1997	Record filed.
	Feb 3 1997	Record filed.
	Feb 18 1997	Motion of Southern States Police Benevolent Association for leave to file a brief as amicus curiae filed.
	Feb 19 1997	CIRCULATED.
	Feb 19 1997	Brief amicus curiae of Jefferson County, Alabama filed.
	Feb 20 1997	Brief of respondent Monroe County, Alabama filed.
	Feb 20 1997	Brief amici curiae of National Association of Counties, et al. filed.
	Feb 21 1997	Motion of the Acting Solicitor General for leave to participate in oral argument as amcius curiae and for divided argument filed.
	Mar 3 1997	Motion of Southern States Police Benevolent Association for leave to file a brief as amicus curiae GRANTED.
	Mar 3 1997	Motion of the Acting Solicitor General for leave to participate in oral argument as amcius curiae and for divided argument DENIED.
	Mar 7 1997	Reply brief of petitioner Walter McMillan filed.
	Mar 18 1997	ARGUED.

No. _____

IN THE

Supreme Court of the United States

October Term, 1996

WALTER McMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same question upon which this Court granted certiorari in *Swint v. Chambers County Commission,* 115 S.Ct. 1203 (1995), but which the Court did not resolve because of the jurisdictional defect in *Swint.* The question presented is:

Whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter McMillian requests that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review that Court's decision holding that sheriffs in Alabama are not final county policymakers in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

OPINIONS BELOW

The July 9, 1996 opinion of the Eleventh Circuit is reported as *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996), and is reproduced in the appendix to this petition, p. 1a. The February 18, 1994 opinion of the United States District Court for the Middle District of Alabama is unreported and is reproduced in the appendix, p. 25a. A

relevant December 13, 1993 order of the District Court is unreported and is reproduced in the appendix, p. 77a.

JURISDICTION

The opinion of the Court of Appeals was issued on July 9, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal statute involved is 42 U.S.C. § 1983. Article V, § 138 of the Alabama Constitution is relevant, as are various provisions of the Alabama Code, including §§ 36-22-2, 36-22-3, 36-22-5, 36-22-6, 36-22-13, 36-22-16, 36-22-17, 36-22-18, 36-22-19, 36-22-42, 11-1-11, and 11-2-30. All of these provisions are set out verbatim in the appendix, p. 81a.

STATEMENT OF THE CASE

Walter McMillian spent nearly six years on Alabama's Death Row for a crime he did not commit. Over a year of that involved pretrial detention in which he was placed on Death Row despite the fact that his case had not yet gone to trial. He eventually was tried, convicted, and sentenced to death. In February of 1993, the Alabama Court of Criminal Appeals reversed Mr. McMillian's capital murder conviction and death sentence after it was established that critical evidence corroborating Mr. McMillian's claim of innocence had been withheld by government officials. *McMillian v. State*, 616 So.2d 933 (Ala. Cr. App. 1993). A few days later, the State of Alabama dismissed the charges against Mr. McMillian and he was freed from imprisonment. The State began a new investigation to find the real perpetrator of the murder. Pet. App. 1a-2a.

This civil case was filed by Mr. McMillian against various governmental officials involved in his arrest and incarceration, including Thomas Tate, who is the Sheriff of Monroe County, Alabama. In addition, Monroe County was named as a defendant. The case seeks damages for violations of federal constitutional rights as well as various state law torts stemming from wrongful conduct in connection with Mr. McMillian's arrest and incarceration, including the pretrial detention on Death Row, the manufacture of inculpatory evidence, and the suppression of exculpatory evidence. Pet. App. 2a. The record in the case demonstrates that any judgment against Sheriff Tate is likely not to be paid from the state treasury, but by Monroe County through its insurance policy with the Association of County Commissions of Alabama. Pet. App. 77a.

Motions to Dismiss by each of the individual defendants were denied in whole or in part. However, Monroe County's motion to dismiss was granted. The County had been sued upon the plaintiff's contention that Sheriff Tate is a final county policymaker in the area of law enforcement and the County is therefore liable under § 1983 for his unconstitutional actions. The District Court rejected that contention and granted the County's motion to dismiss based upon the Eleventh Circuit's decision in *Swint v. City of Wadley*, 5 F.3d 1435, 1450-1451 (11th Cir. 1993), which held that Alabama sheriffs are not county policymakers. Pet. App. 53a-58a.

Subsequently, this Court granted certiorari in *Swint* to review the Eleventh Circuit's decision on the county policymaker issue. *Swint v. Chambers County Commission*, 114 S.Ct. 2671 (1994). This Court, however, ultimately did not resolve the merits, instead vacating the Eleventh Circuit's decision in *Swint* and holding that the Eleventh Circuit had no jurisdiction to review the county policymaker issue on an

interlocutory appeal inasmuch as no certification had been obtained under 28 U.S.C. § 1292(b) to appeal that question. *Swint v. Chambers County Commission*, 115 S.Ct. 1203, 1207-1212 (1995).

In the meantime, the District Court in the present case, having adjudicated the motions to dismiss, entertained motions for summary judgment by the defendants, granting them in part and denying them in part. Because some of the denials of summary judgment involved issues of qualified immunity, Sheriff Tate and some of the other defendants appealed pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The District Court then issued an order under 28 U.S.C. § 1292(b) certifying the county liability issue for interlocutory appeal. The Eleventh Circuit agreed to the certification. Pet. App. 3a.

The appeal of Sheriff Tate and the other individual defendants is separate from that of the petitioner. In Tate's appeal, the Eleventh Circuit affirmed the District Court for the most part, leaving Tate and several fellow defendants in the case. *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996).

As for the petitioner's separate appeal on the county liability issue, the Eleventh Circuit held that the Sheriff is not a final county policymaker in the area of law enforcement. In doing so, the Eleventh Circuit said that the line between municipal liability and non-liability "has proven elusive" and that this Court "has provided limited guidance for determining whether an official has final policymaking authority with respect to a particular action." Pet. App. 5a.

The Court of Appeals acknowledged that sheriffs are elected by the voters of the county, that the county commissions fund the sheriffs' law enforcement operations,

and that sheriffs exercise final law enforcement authority within their counties but not outside of them. Pet. App. 15a-16a_ and n. 5. Nevertheless, the Court based its ruling on a readoption of the reasoning of its earlier vacated decision in *Swint*, which had held that county liability did not exist because other county officials had no law enforcement responsibilities independent of those exercised by the sheriff. The Court of Appeals said the same in the present case:

> [In *Swint*] [w]e noted that a sheriff is a state rather than a county official under Alabama law for purposes of imposing respondeat superior liability on a county. [5 F.3d at 1450] (citing *Parker v. Amerson*, 519 So.2d 442 (Ala. 1987)). However, that fact was not dispositive. *Id.* (citing *Parker v. Williams*, 862 [F.2d 1471,] 1478 [(11th Cir. 1989)].
>
> . . . . Our examination of Alabama law revealed that Alabama counties have no law enforcement authority. *Id.* Alabama counties have only the authority granted them by the legislature. *Id.* (citing *Lockridge v. Etowah County Comm'n*, 460 So.2d 1361, 1363 (Ala. Civ. App. 1984)). Alabama law assigns law enforcement authority to sheriffs but not to counties. *Id.* (citing Ala. Code § 36-22-3(4) (1991)). Thus, we concluded that a sheriff does not exercise county power when he engages in law enforcement activities and, therefore, is not a final policymaker for the county in the area of law enforcement. *Id.* at 1451. *We continue to believe this is the correct analysis.*

Pet. App. 7a-8a (emphasis added).

This petition follows. It raises only the Eleventh Circuit's decision regarding county liability, and does not involve issues regarding the liability of other defendants.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *PEMBAUR v. CINCINNATI.*

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), this Court held that local governmental liability can be imposed under Section 1983 for the single action of a local governmental policymaker if that person has final policymaking authority such that his or her "acts or edicts may fairly be said to represent official policy." 475 U.S. at 480, *quoting*, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). *Pembaur* involved a suit against several defendants, including a county in Ohio, because of an unconstitutional entry and search of the plaintiff's business. One of the alleged grounds for county liability was that the sheriff's unconstitutional actions were those of a final county policymaker. Justice Brennan's opinion in *Pembaur* made it clear that "decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to [local governmental] liability." 475 U.S. at 483, n. 12 (emphasis in original). In *Pembaur*, this Court affirmed the conclusion of the Sixth Circuit Court of Appeals that the sheriff in that case could act as a final county policymaker with respect to law enforcement. 475 U.S. at 484.

The portion of the Sixth Circuit's opinion on the matter stated that, under Ohio law, the sheriff is elected by the residents of the county, serves as chief law enforcement officer of the county, receives his office, books, furniture, and other materials from the county, and receives his salary and training expenses from the county. Because of these factors, the Sixth Circuit held that the sheriff is a final policymaker for the county with respect to the law enforcement activities at issue, *Pembaur v. Cincinnati*, 746 F.2d 337, 341 (6th Cir.

1984), and this Court affirmed on that point. 475 U.S. at 484.

Similarly, under Alabama law, the sheriff is elected by the residents of the county, serves as chief law enforcement officer for the county, receives his office, books, furniture, and other materials from the county, and receives his salary and expenses from the county. Pet. App. 15a-16a and n. 5; Ala. Const. Art. V, § 138; Ala. Code §§ 36-22-3, 36-22-5, 36-22-16, 36-22-18. There is nothing of relevance to distinguish the Alabama sheriff from the Ohio sheriff in *Pembaur*.

Certainly the technical labeling of the Alabama sheriff as a "state official" is not a relevant distinction absent some functional distinction showing that sheriffs in Alabama operate differently than those in Ohio. While the Eleventh Circuit in the present case noted that Alabama sheriffs are sometimes characterized as state officials under state law, the Court also made it clear that this point was not dispositive. Pet. App. 7a. Nor could it be. As Justice O'Connor observed in *St. Louis v. Prapotnik*, 485 U.S. 112, 126 (1988), "if . . . a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its useful purpose." Similarly, if states could insulate their counties from liability simply by labeling sheriffs and others who operate on the local level as "state officials," § 1983 would easily be thwarted.

Moreover, even if a state's label did somehow make a difference, Alabama's label here does not speak to the question posed by § 1983. It does not specify, for example, that the sheriff sets law enforcement policy for the state as opposed to the county, or that the sheriff is not a final county policymaker in the area of law enforcement. The Eleventh

Circuit's characterization of the sheriff as a "state official" is predicated only on the fact that the Alabama Constitution specifies that the state's executive department includes "a sheriff for each county," Ala. Const. Art. V, § 112, along with the holdings by Alabama's courts that counties are not vicariously liable for sheriffs' actions under state tort law. Pet. App. 12a.[1] Obviously, a state can structure its state law respondeat superior liabilities and immunities any way it chooses, and can attach whatever labels it wants to officials, but that does not mean the sheriff makes law enforcement policy for the state rather than the county.

Indeed, Alabama law and the Alabama courts frequently have expressed the common understanding of the sheriff as a county-based official setting policy for the county. *See, e.g., First Mercury Syndicate v. Franklin*, 623 So.2d 1075, 1075 (Ala. 1993) (county purchases professional liability insurance for the sheriff); *Jefferson County v. Dockerty*, 30 So.2d 474, 477 (Ala. 1974) ("the sheriff of Jefferson County is undoubtedly a county officer"); *In re County Officers*, 143 So. 345 (Ala. 1932) (sheriffs are "strictly speaking, county officers" for purposes of 1912 constitutional amendment regarding salaries); *State ex rel. Martin v. Pratt*, 68 So. 255, 257 (Ala. 1915) ("a sheriff [is] the highest purely executive officer of a county"). State statutes put the county commission in charge of funding the sheriff's office, Ala. Code § 36-22-18, and provide that "[i]t shall be the duty of sheriffs *in their respective counties*, . . . to ferret out crime, apprehend and arrest criminals and . . . to secure evidence of crimes *in their counties*." Ala. Code § 36-22-3(4). Beyond

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[1] In passing, the Court of Appeals seemed to suggest that the petitioner had "concede[d]" that "sheriffs in Alabama are state officers." Pet. App. 17a. Although this was not the basis of the Court's holding and is not crucial to this petition, we feel constrained to note that the petitioner never made any such concession.

that, the record in this case demonstrates that the payment of any judgment against the sheriff is not to come from the state treasury, but from an insurance fund set up by Alabama's counties. Pet. App. 77a. *See, Hess v. Port Authority,* 115 S.Ct. 394 (1994) (the fact that a judgment will not be paid from the state treasury suggests that the entity or person being sued is not the alter ego of the state for Eleventh Amendment purposes).

Thus, the occasional label of the sheriff as a state official in Alabama does not distinguish this case from *Pembaur* in any meaningful way. Instead of simply relying on the label, the Eleventh Circuit based its ruling on its conclusion that Alabama counties have no law enforcement authority independent of the sheriff. Pet. App. 7a-8a, 14a-16a. The Court of Appeals said, "Alabama counties have no law enforcement authority," and "Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 7a-8a. This is circular reasoning. It simply assumes in advance that the sheriff does not function as a county official, and that the law enforcement authority of the sheriff is not being exercised for the county, but for some other entity. It hinges the inquiry on whether counties have law enforcement authority other than the authority excercised by the sheriff. This would seem to require that other county officials also be involved in law enforcement before the sheriff can be deemed a policymaker for the county. The Eleventh Circuit's analysis thus suggests that if other county officials are not involved, the sheriff must not be exercising power on behalf of the county.

Of course, the absence of law enforcement authority independent of the sheriff is not something that distinguishes Alabama counties from those in Ohio and elsewhere. It is not as if county governing boards in Ohio have independent law enforcement authority, or directly supervise the law

enforcement activities of their sheriffs, or ride around with the sheriffs in the patrol cars. Thus, this does not differentiate the present case from *Pembaur*.

Both *Pembaur* and *Prapotnik* note that the final policymaker issue is to be guided by state law (as well as custom and usage). However, state statutes -- whether in Alabama, Ohio, or elsewhere -- do not employ the terminology of § 1983 jurisprudence and do not specify whether particular officials are "final county policymakers" for the purposes of applying § 1983. Similarly, they do not state in specific terminology whether a sheriff or other official sets "county policy" or "state policy." Thus, federal courts must examine the actual structures of local government and the relationships of officials, as set out by state law, and determine, in light of the goals of § 1983, whether particular officials are "final policymakers" for local governments as that term has been articulated in *Pembaur* and *Prapotnik* and subsequent cases.

While the actual operation of local government is a matter of state law (as well as custom and usage), the question remains -- once the relevant principles of state law have been established -- whether those state law principles add up to "final policymaker" status as a matter of federal law. If the relevant principles in Ohio lead this Court to conclude, as it did in *Pembaur*, that particular officials are final county policymakers for purposes of § 1983, then the existence of those same basic principles in other states, such as Alabama, require that similar officials in those states also be considered final county policymakers. Accordingly, the challenge in this case is not so much to the Eleventh Circuit's construction of state law, but to its conclusion that this construction precludes county liability under federal law. With respect to that issue, this Court's holding in *Pembaur* is controlling, and the Eleventh Circuit's decision is in conflict.

II. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF THE COURTS OF APPEAL FOR THE FIRST, FOURTH, FIFTH, SIXTH, AND NINTH CIRCUITS.

At least five other circuits -- the First, Fourth, Fifth, Sixth and Ninth -- have reached conclusions that are at odds with the Eleventh Circuit's decision here. Indeed, the Eleventh Circuit's opinion in this case recognizes that its reasoning conflicts with that of the Fifth Circuit in comparable cases. Pet. App. 16a and n.6. Because the case law from the Fifth Circuit is the most extensive, it will be discussed first.

In *Turner v. Upton County*, 915 F.2d 133 (5th Cir. 1990), the Fifth Circuit held that counties in Texas can be liable for the law enforcement actions of sheriffs. The plaintiff in *Turner* sued a sheriff and the county because the sheriff allegedly trumped up a sham prosecution against her. Although the federal district court granted summary judgement for the county, concluding it was not liable for the sheriff's actions, the Fifth Circuit reversed. Because of its relevance, the Fifth Circuit's discussion is quoted at length:

> It has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected:
>
> > Because of the . . . structure of county government in Texas . . . elected county officials, such as the sheriff . . . hold[] virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the

> voters for his conduct therein. . . . Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.

Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir.1980) (quoting *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037, citations omitted); *see Bennett v. City of Slidell*, 728 F.2d 762, 796 (5th Cir.1984) (en banc), *cert denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985). Among other responsibilities he is charged with preserving the peace in his jurisdiction and arresting all offenders. Tex.Code Crim.P. arts. 2.13, 2.17. [He is] the county's final policymaker in this area . . . . [His duties] include the investigation of crimes, the collection of evidence thereof, and the presentation of this evidence to the district attorney for purposes of determining the appropriateness of prosecution. . . .

> The sheriff is an elected county official equal in authority to the county commissioners within that jurisdiction; his actions are as much the actions of the county as the actions of those commissioners.

Turner, 915 F.2d at 136-137. *See also, Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996) (reaffirming *Turner*).

Like the Texas sheriff in *Turner*, the Alabama sheriff is charged with preserving the peace in his or her county and arresting all offenders, investigating crimes, collecting evidence, and presenting evidence to the district attorney. Ala. Code, § 36-22-3. To use the words from *Familias*

Unidas, as quoted in *Turner*, the Alabama sheriff holds "virtually absolute sway over the particular tasks or areas entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein."

In *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), the Fifth Circuit was called upon to examine the policymaker status of an Arkansas county sheriff. In holding the sheriff to be a final policymaker for purposes of county liability, the Fifth Circuit said:

> Under Arkansas law, a county sheriff, in the execution of the statutory duty to perform law enforcement activities in and for the county, is solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers.

884 F.2d at 828 (citation omitted). This is also true of a county sheriff in Alabama. Just as the sheriff was held to be a final county policymaker in *Crowder* for purposes of the investigation, search, and seizure at issue in that case, so is the Sheriff in Monroe County, Alabama, a final county policymaker for purposes of the investigation, arrest, and incarceration at issue in this case. *See also, Brooks v. George County, Mississippi*, 84 F.3d 157, 165 (5th Cir. 1996) (Mississippi sheriffs are final county policymakers).

The Eleventh Circuit in the decision below pointed out that Alabama sheriffs are in some sense labeled by Alabama law as state officers, but added that this fact was not dispositive. Pet. App. 7a. However, to the extent this accounts for the Eleventh Circuit's decision, that Court would continue to be in conflict with the Fifth Circuit. In *Crane v. Texas*, 766 F.2d 193 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985), the Fifth Circuit held a Texas county liable for

actions of a district attorney, who is technically a state official under Texas law. With respect to the district attorney, the Fifth Circuit said, "much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but limited in the exercise of those powers to the county, filled by its voters, and paid for with its funds." *Id.* at 195. The Court added: "[E]ven were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements." *Id.* Similarly, the Alabama sheriff, although sometimes technically called an officer of the state under state law and deriving power from state statutes, is limited in the exercise of that power to the county, is elected by the county's voters, and is funded by the county's treasury.

With respect to the First Circuit, that Court held in *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), that Massachusetts sheriffs can be final county policymakers regarding jail policies even though they have complete control over those policies with no involvement of other county officials. *Id.* at 571.

> What the County misunderstands is that it is not because county officials *other than the Sheriff* were "involved" in the promulgation of the strip search rule, that it is liable under *Monell*, nor is it because county officials failed properly to "oversee" the Sheriff. Rather, it is liable because the Sheriff was the county official who was elected by the County's voters to act for them and to exercise the powers created by state law. Accordingly, the Sheriff's strip search policy *was* Plymouth County's policy, and the County must respond in damages for any injuries inflicted pursuant to that policy.

Id. (emphasis in original). As with the Fifth Circuit, this First Circuit precedent conflicts with the Eleventh Circuit in the present case.

The Fourth Circuit, in *Dotson v. Chester,* 937 F.2d 920 (4th Cir. 1991), held that a Maryland sheriff is a final county policymaker for jail administration, even though under the relevant state law he was considered a state officer and not a county officer for purposes of state tort liability. *Id.* at 926. That Court quoted Justice O'Connor's caution, in her plurality opinion in *St. Louis v. Prapotnik*, against "egregious attempts by local governments to insulate themselves from liability for unconstitutional policies." 937 F.2d at 924, *quoting,* 485 U.S. at 127. Based on this, the Fourth Circuit said *Prapotnik* "indicates [§ 1983] liability rests more on final policymaking authority than on a technical characterization of an official as a state or county employee." 937 F.2d at 924. According to the Fourth Circuit, it was sufficient for county liability that the county governing board funded the jail and the sheriff managed it. *Id.* at 932. Given that the Eleventh Circuit held to the contrary in the present case, and given that it apparently gave some weight to the technical label of a sheriff as a state official, pet. app. 13a, the Eleventh Circuit is in conflict with the Fourth Circuit.

In *Marchese v. Lucas*, 758 F.2d 181, 188-189 (6th Cir. 1985), the Sixth Circuit held that Michigan counties are liable for the actions of their sheriffs even though no county officials other than the sheriff are involved in law enforcement policy, and even though Article 7, Section 6 of the Michigan Constitution provides that "[t]he county shall never be responsible for [the sheriff's] acts."

> It is clear that under the Michigan Constitution of 1968 Art. 7, Section 6, Wayne County did not make policy for the Sheriff's Department. The Sheriff is, however, the

> law enforcement arm of the County and makes policy in police matters for the County. *See* Michigan Constitution 1968 Art. 7, Section 4. The County, through its Board of Supervisors, appropriates funds and establishes the budget for the Sheriff's Department. The Sheriff is elected by the voters of Wayne County.

Id. at 188-189. As in Michigan, no one in Alabama county government makes law enforcement policy other than the sheriff, the sheriff's budget is appropriated by the county governing board, and the sheriff is elected by the voters. Article 7, Section 4 of the Michigan Constitution -- cited by the *Marchese* court -- states that "[t]here shall be elected from for four-year terms in each organized county a sheriff, a county clerk, a county treasurer . . . ." Article V, § 138 of the Alabama Constitution also provides that a sheriff is one of the public officials who shall be elected by the qualified voters in each county. The only difference is that the Alabama Constitution labels the sheriff as an official of the state executive department, while the Michigan Constitution does not, but the Eleventh Circuit has said this is not dispositive. On the point the Eleventh Circuit has said is dispositive -- the absence of any county law enforcement authority beyond that granted to the sheriff -- the Sixth Circuit clearly is in conflict.

The Ninth Circuit in *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989), rejected the same reasoning that motivated the Elevent Circuit's decision in this case. *Gobel* involved a suit against an Arizona county attorney for initiating and publicizing an arrest without probable cause. The district court there dismissed on the theory that the county attorney was simply enforcing state law independent of the county. The Ninth Circuit reversed, citing both *Blackburn v. Snow* from the First Circuit and *Crane v. Texas* from the Fifth, and held that dismissal was inappropriate in

light of the fact that county attorneys were elected by county voters, were county officers, and exercised their responsibilities within the county with a budget set by the county. 867 F.2d at 1208-1209.

These decisions from the First, Fourth, Fifth, Sixth, and Ninth Circuits make it clear that the absolute power held by an official, such as a sheriff, in a particular area of responsibility, such as law enforcement, does not absolve a county from liability for that official's actions. Alabama is no different than the states involved in those cases, or many other states for that matter, in terms of the relationship between the sheriff and the county. It is not as if the law enforcement actions of the sheriffs in those other states are subject to participation or review by county governing boards or other county officials. Indeed, the fact that the law enforcement power is held independent of other county officials demonstrates that the sheriff is a *final* county policymaker. Moreover, as *Crane* from the Fifth Circuit and *Dotson* from the Fourth Circuit illustrate, the label of the official as a "state" or "county" official is unimportant. What is important is whether the official is elected by voters of the county, exercises power only within the county, and is supported by county funds. This is the case in Alabama, as in most other places. Under the approaches of the First, Fourth, Fifth, Sixth, and Ninth Circuits, county liability would exist. The decision below by the Eleventh Circuit is in conflict.

III. THIS CASE RAISES AN IMPORTANT ISSUE OF FEDERAL LAW THAT WAS NOT RESOLVED BY THIS COURT'S DECISION IN *SWINT v. CHAMBERS COUNTY COMMISSION.*

This is an important issue of federal law. A number of cases are brought against local governments under § 1983, in

Alabama and elsewhere, for the actions of high officials, particularly in the area of law enforcement. The theory that underlies the Eleventh Circuit's decision is not limited solely to Alabama, but could be utilized in any state where certain officials, such as sheriffs, have absolute sway over particular areas, such as law enforcement, independent of other county officials. The Eleventh Circuit's narrow interpretation of local governmental liability seems contrary to what this Court described as the intent of Congress in 1871, when it enacted § 1983 in order "to provide a remedy, *to be broadly construed*, against all forms of official violation of federally protected rights." *Monell v. New York City Dept. of Social Services*, 436 U.S. at 700-701 (emphasis added).

Enough complexity exists already in the interpretation of § 1983 without the added confusion and conflict created by the Eleventh Circuit's decision. Indeed, the Eleventh Circuit itself suggested the need for clarification from this Court, stating that this is in area of the law where clarity "has proven elusive," where "[t]he Supreme Court has provided limited guidance," and where "[t]he Supreme Court has not addressed whether a municipality must have power in an area to be held liable for an official's acts in that area." Pet. App. 5a, 8a. While we believe the Eleventh Circuit has acted contrary to this Court's prior guidance, the Eleventh Circuit's own confusion demonstrates the importance of further clarification by this Court.

This Court granted certiorari in *Swint v. Chambers County Commission* to review the decision of the Eleventh Circuit and to provide direction to courts facing similar questions in the future. However, because of the jurisdictional problem in *Swint*, this Court did not resolve the merits. The present case raises the same substantive issue as *Swint*, but without the jurisdictional defect. This is an opportunity for this Court to address what it intended to

address when it granted certiorari in *Swint*.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Eleventh Circuit in this case.

Respectfully Submitted,

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APPENDIX

WALTER McMILLIAN, Plaintiff-Appellant,

v.

W. E. JOHNSON, MORRIS THIGPEN, TOM ALLEN, MARIAN SHINBAUM, CHARLIE JONES, et al., in their individual capacities, Defendants-Appellees.

No. 95-6369

United States Court of Appeals, Eleventh Circuit

July 9, 1996

Appeal from the United States District Court for the Middle District of Alabama.

Before COX, Circuit Judge, BARKETT, Circuit Judge, and PROPST, District Judge (sitting by designation).

COX, Circuit Judge:

I. FACTS AND PROCEDURAL BACKGROUND[1]

Walter McMillian was convicted of the murder of Ronda Morrison and sentenced to death. He spent nearly six years on Alabama's death row, including over a year before his trial. The Alabama Court of Criminal Appeals ultimately overturned McMillian's conviction because of the state's failure to disclose exculpatory and impeachment evidence. *McMillian v. State*, 616

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[1]For a more detailed recitation of the facts, see our opinion in No. 95-6123, also decided today.

So. 2d 933 (Ala. Crim. App. 1993). The state then dismissed the charges against McMillian and commenced a new investigation.

Finally released after six years on death row, McMillian brought a § 1983 action against various officials involved in his arrest, incarceration, and conviction. McMillian alleges federal constitutional claims, as well as pendent state law claims. McMillian sued several defendants, including Thomas Tate, the Sheriff of Monroe County, Alabama, in both his individual and official capacities, and Monroe County itself. McMillian seeks damages from Sheriff Tate individually and from Monroe County for, inter alia, causing his pretrial detention on death row, manufacturing inculpatory evidence, and suppressing exculpatory and impeachment evidence.[2]

McMillian's theory of county liability is that Sheriff Tate's "edicts and acts may fairly be said to represent [the] official policy [of] . . . Monroe County . . . in matters of criminal investigation and law enforcement." (First Amended Complaint P 53.) The district court granted Monroe County's motion to dismiss, relying on our since-vacated decision in *Swint v. City of Wadley, Ala.*, 5 F.3d 1435 (11th Cir. 1993), *vacated sub nom. Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995), 131 L. Ed. 2d 60, to hold that Monroe County is not liable for Sheriff Tate's actions under § 1983 because sheriffs in Alabama are not final policymakers for their counties in the area

[2]A suit against a public official in his official capacity is, in all respects other than name, treated as a suit against the local government entity he represents, assuming that the entity receives notice and an opportunity to respond. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985). We treat McMillian's claims against Monroe County as stating the same claims because McMillian contends that Sheriff Tate represents Monroe County. Whether McMillian's contention is meritorious is at issue on this appeal.

of law enforcement. In a later order, the district court granted in part and denied in part various defendants' motions for summary judgment in their individual capacities. Pursuant to 28 U.S.C. § 1292(b), we granted McMillian permission to appeal the district court's interlocutory orders.

II. ISSUES ON APPEAL

We address two issues on this appeal: (1) whether a sheriff in Alabama is a final policymaker for his or her county in the area of law enforcement; and (2) whether hearsay may be used to establish the existence of a genuine issue of material fact to defeat a motion for summary judgment when it is not shown that the hearsay will be reducible to an admissible form at trial.[3]

III. DISCUSSION

A. *Whether a Sheriff in Alabama Is A Final County Policy maker*

1. *Contentions of the Parties*

McMillian contends that our decision in *Swint* is of no

[3]McMillian raises two other issues on this appeal. First, he contends that the district court erroneously required him to prove violence or torture on his claim that the state coerced witnesses to give false testimony. We do not read the district court's opinion to impose such a requirement on McMillian.

Second, McMillian contends that the district court erred in granting partial summary judgment on certain of his claims. The district court evaluated McMillian's allegations incident by incident and determined whether a genuine issue of material fact exists as to each incident. McMillian's contention that the district court erred in evaluating evidence this way is meritless. *See* 11th Cir. R. 36-1.

precedential or persuasive value because the Supreme Court granted certiorari and then vacated our decision on jurisdictional grounds. In any event, he contends, *Swint* was wrongly decided. McMillian urges that this case is controlled by *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), in which the Supreme Court affirmed the Sixth Circuit's holding that an Ohio sheriff could establish county law enforcement policy under appropriate circumstances. According to McMillian, the relevant facts here are the same as in *Pembaur*: in Alabama, the sheriff is elected by the county's voters, is funded by the county treasury, and is the chief law enforcement officer within the county. McMillian argues that our decision holding that Alabama sheriffs are final county policymakers in the area of jail administration, see *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989), also compels a holding that Alabama sheriffs are final policymakers in the area of law enforcement.

Monroe County contends that *Swint* correctly held that Alabama sheriffs are not county policymakers in the area of law enforcement because, under state law, Alabama counties have no law enforcement authority. In addition, according to the County, holding it liable for the actions of a sheriff would be contrary to the Supreme Court's reasoning in *Monell* in two respects. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). First, because counties have no control over sheriffs, allowing county liability for a sheriff's actions would ignore *Monell's* conception of municipalities as corporations and substitute a conception of municipalities as mere units of geography. Second, holding the county liable for a sheriff's actions would impose even broader liability than the respondeat superior liability rejected in *Monell*. Finally, Monroe County argues that cases from our circuit, as well as the better reasoned cases from other circuits, require a "functional" analysis looking to whether the county has control

over the sheriff or has other power in the area of the sheriff's actions.

2. *County Liability for Acts of Final Policymakers*

A municipality, county, or other local government entity is a "person" that may be sued under § 1983 for constitutional violations caused by policies or customs made by its lawmakers or by "those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38. A municipality may be held liable for a single act or decision of a municipal official with final policymaking authority in the area of the act or decision. *Jett v. Dallas Independent School District*, 491 U.S. 701, 737, 109 S. Ct. 2702, 2724, 105 L. Ed. 2d 598 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 924, 99 L. Ed. 2d 107 (1988) (plurality opinion); *Pembaur*, 475 U.S. at 480, 106 S. Ct. at 1298. A municipality may not be held liable, however, solely because it employs a tortfeasor, that is, under a respondeat superior theory. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036. The line between actions embodying official policy--which support municipal liability--and independent actions of municipal employees and agents--which do not support municipal liability--has proven elusive.

The Supreme Court has provided limited guidance for determining whether an official has final policymaking authority with respect to a particular action. In the Court's earliest attempts to establish the contours of municipal liability, a majority of the Court was unable to agree on the appropriate approach to final policymaker status. *See Pembaur*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452; *Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107. In *Jett*, though, Justice O'Connor's approach in *Praprotnik* garnered the support of a majority of the Court. See *Jett*, 491 U.S. at 737, 109 S. Ct. at

2723-24. We draw from Justice O'Connor's opinion, as adopted in *Jett*, several principles to guide our decision.

Most important is the principle that state law determines whether a particular official has final policymaking authority. *Praprotnik*, 485 U.S. at 123, 108 S. Ct. at 924. We must look to state and local positive law, as well as custom and usage having the force of law. *Id.* at 124 n.1, 108 S. Ct. at 924 n.1. Identifying final policymakers may be a difficult task, but state law always should direct us "to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Id.* at 125, 108 S. Ct. at 925. We may not assume that final policymaking authority lies in some entity other than that in which state law places it. *Id.* at 126, 108 S. Ct. at 925. To the contrary, we must respect state and local law's allocation of policymaking authority. *Id.* at 131, 108 S. Ct. at 928.

Two more principles guide our inquiry. First, "the authority to make municipal policy is necessarily the authority to make final policy." *Id.* at 127, 108 S. Ct. at 926. Second, the alleged policymaker must have final policymaking authority with respect to the action alleged to have caused the particular constitutional or statutory violation. *Id.* at 123, 108 S. Ct. at 924; *Jett*, 491 U.S. at 737, 109 S. Ct. at 2724. An official or entity may be a final policymaker with respect to some actions but not others. See *Pembaur*, 475 U.S. at 483 n.12, 106 S. Ct. at 1300 n.12. With respect to a particular action, more than one official or body may be a final policymaker; final policymaking authority may be shared. *Praprotnik*, 485 U.S. at 126, 108 S.Ct. at 925.

3. *Our Holding in Swint*

We have already addressed whether, in Alabama,

sheriffs are final policymakers for their counties in the area of law enforcement. *Swint v. City of Wadley, Ala.*, 5 F.3d 1435. In *Swint*, we held that sheriffs are not final policymakers for their counties in the area of law enforcement because counties have no law enforcement authority. *Id.* at 1451. We agree with McMillian that, because the Supreme Court held that we lacked jurisdiction in Swint and vacated our decision, *Swint* is not binding precedent. McMillian argues further that the Supreme Court questioned our holding on the merits in *Swint* and that *Swint* is of no persuasive value. Though we decline to draw any inference from the Supreme Court's grant of certiorari, we have taken a fresh look at *Swint* and the issue before us.

We recognized in *Swint* that an official with final policymaking authority in a particular area of a municipality's business may subject the municipality to § 1983 liability through her actions within that authority. *Id.* at 1450 (citations omitted). In *Swint*, the plaintiff sought to hold Chambers County, Alabama, liable for raids authorized by its sheriff. To determine whether the Chambers County Sheriff possessed final policymaking authority for Chambers County in the area of law enforcement, we looked to Alabama law, as required by *Jett* and *Praprotnik*. *Id.* We noted that a sheriff is a state rather than a county official under Alabama law for purposes of imposing respondeat superior liability on a county. *Id.* (citing *Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987)). However, that fact was not dispositive. *Id.* (citing *Parker v. Williams*, 862 F.2d at 1478).

The critical question under Alabama law, we emphasized, is whether an Alabama sheriff exercises county power with final authority when taking the challenged action. *Id.* (citing *Parker v. Williams*, 862 F.2d at 1478). Our examination of Alabama law revealed that Alabama counties have no law enforcement authority. *Id.* Alabama counties have

only the authority granted them by the legislature. *Id.* (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)). Alabama law assigns law enforcement authority to sheriffs but not to counties. *Id.* (citing Ala. Code § 36-22-3(4) (1991)). Thus, we concluded that a sheriff does not exercise county power when he engages in law enforcement activities and, therefore, is not a final policymaker for the county in the area of law enforcement. 5 F.3d at 1451. We continue to believe that this is the correct analysis.

The Supreme Court has not addressed whether a municipality must have power in an area to be held liable for an official's acts in that area. Still, we think that such a requirement inheres in the Court's municipal liability analysis. As Justice O'Connor explained in *Praprotnik*, a municipal policymaker is the official with final responsibility "in any given area of a local government's business." 485 U.S. at 125, 108 S. Ct. at 925. A threshold question, therefore, is whether the official is going about the local government's business. If the official's actions do not fall within an area of the local government's business, then the official's actions are not acts of the local government. That Swint properly asked this threshold question is confirmed by our precedent, as well as cases from other circuits. *See Owens v. Fulton County*, 877 F.2d 947, 950 (11th Cir. 1989) (asking whether district attorney was exercising county or state authority); *Parker v. Williams*, 862 F.2d at 1478 (asking whether sheriff was implementing county's or state's duty); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (asking whether county judge was exercising county or state authority). *Accord, e.g., Eggar v. City of Livingston*, 40 F.3d 312, 314 (9th Cir. 1994) (asking whether judge's acts were performed under municipality's or state's authority), *cert. denied*, 115 S. Ct. 2566 (1995), 132 L. Ed. 2d 818 ; *Dotson v. Chester*, 937 F.2d 920, 924 (4th Cir. 1991) (asking whether sheriff wields county or state authority) (citing

Owens and *Parker*); *Baez v. Hennessy*, 853 F.2d 73, 77 (2nd Cir. 1988) (asking whether district attorney represents county or state), *cert. denied*, 488 U.S. 1014, 109 S. Ct. 805, 102 L. Ed. 2d 796 (1989); *Soderbeck v. Burnett County, Wisconsin*, 821 F.2d 446, 451-52 (7th Cir. 1987) (*Soderbeck II*) (asking whether sheriff acts on behalf of county or state).

McMillian contends that, even if *Swint*'s analytical framework is sound, *Swint* nevertheless was wrongly decided. He questions *Swint*'s conclusion that Alabama sheriffs do not exercise policymaking authority for the county in the area of law enforcement. He argues that, since their decisions are unreviewable, sheriffs must set policy for some entity. If *Swint* is correct that they do not set county policy, he reasons, then the only alternative is that they set state law enforcement policy. According to McMillian, though, sheriffs simply cannot set state law enforcement policy. Thus, they must set county policy.

We are unpersuaded by this argument. We need not, and do not, decide whether sheriffs are state policymakers to hold that they are not county policymakers. But, to respond to McMillian's argument, we note that state law could make sheriffs final policymakers for the state, notwithstanding that they are elected by county voters and have county-wide jurisdiction. McMillian's arguments to the contrary involve the power to "set policy" in a generic sense. "Policymaker" in § 1983 jurisprudence, however, is a term of art that refers to the official or body that speaks with final authority with respect to a particular governmental decision or action. *Jett*, 491 U.S. at 737, 109 S. Ct. at 2724.

Using "policy" generically, McMillian may be correct that, under principles of representative government, an official elected locally should not set statewide "policy." And he may be correct that, generically speaking, "policy" of a state

connotes a single policy rather than one state "policy" per county. But when "policy" is understood as a § 1983 law term of art, we see no reason why a county sheriff may not be a final policymaker for the state in the area of law enforcement insofar as state law assigns sheriffs unreviewable state law enforcement power.

McMillian insists that state policy cannot be different in each county. That different entities may share final policymaking authority, *Praprotnik*, 485 U.S. at 126, 108 S. Ct. at 925, however, presumes that one policymaker's actions may subject a municipality to liability even if another policymaker has a different policy. Thus, we see no anomaly in having different state policymakers in different counties. Such a situation would be no different than if each of a city's police precinct commanders had unreviewable authority over how arrestees were processed. Each commander might have a different processing policy, but that does not render a commander's policy that of her precinct as opposed to that of the city when the city is sued under § 1983 for her unconstitutional treatment of arrestees.

McMillian also argues that *Swint* conflicts with precedent from the Supreme Court and our circuit. We address those arguments below.

4. *The Supreme Court's Decision in Pembaur*

McMillian argues that the Supreme Court's decision in *Pembaur* controls his case. Based on Ohio law, the Sixth Circuit held in *Pembaur* that, in a proper case, a sheriff's acts may represent the official policy of an Ohio county. *Pembaur v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984). Though reversing on other grounds, the Supreme Court did not question the Sixth Circuit's conclusion that a sheriff could be a

county policymaker, 475 U.S. at 484, 106 S. Ct. at 1301, explaining that the Supreme Court "generally accords great deference to the interpretation and application of state law by the courts of appeals." *Id.* at n.13, 106 S. Ct. at 1301 n.13 (citations omitted). McMillian contends that the Supreme Court explicitly affirmed the Sixth Circuit's reasoning and holding and, therefore, that the Sixth Circuit's analysis controls here. We disagree.

We do not read the Supreme Court's decision as an affirmation of the Sixth Circuit's analysis of policymaker status. The Supreme Court simply deferred to the Sixth Circuit's conclusion that a sheriff is a county policymaker because the question is one of state law. The Court did not describe or discuss the state law factors on which the Sixth Circuit based its conclusion, nor did it address any arguments about whether a sheriff is a county policymaker. Instead, the Supreme Court's analysis and holding addressed whether --assuming policymaker status--a decision by a municipal policymaker on a single occasion may subject a municipality to § 1983 liability. *Id.* at 471, 106 S. Ct. at 1294. Thus, *Pembaur* does not control the issue presented here.

Even if we were to read the Supreme Court's *Pembaur* opinion as implicitly approving the Sixth Circuit's policymaker analysis, it would not follow that an Alabama sheriff is, like an Ohio sheriff, a policymaker for her county. State law determines whether a particular official has final policymaking authority. *Praprotnik*, 485 U.S. at 123, 108 S. Ct. at 924. Ohio law determined the Sixth Circuit's conclusion. But Alabama law controls our conclusion.

McMillian contends that the Ohio law factors relevant to the Sixth Circuit's decision are the same in Alabama. In both Ohio and Alabama, he argues, sheriffs are elected by the

residents of their counties; receive their salaries, expenses, offices, and supplies from their counties; and serve as the chief law enforcement officers in their counties. According to McMillian, other aspects of Alabama law are either not dispositive or irrelevant. That Alabama law deems sheriffs state rather than county officials, he argues, constitutes merely a non-dispositive label. And, he contends, whether Ohio counties have any law enforcement authority under state law was irrelevant to the Sixth Circuit's analysis, except to the extent that Ohio counties financially support the sheriff's law enforcement apparatus.

We are unpersuaded by McMillian's argument that Ohio and Alabama law are the same in all relevant respects. While we agree that similarities exist, there are differences. Under Alabama law, but not under Ohio law, a sheriff is a state officer according to the state constitution. *Parker v. Amerson*, 519 So. 2d at 442. The Constitution of Alabama of 1901 provides that the state executive department "shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county." Ala. Const. art. V, § 112 (emphasis added). The Alabama Supreme Court has held that sheriffs are employees of the state, not their counties, and thus that counties may not be held vicariously liable for sheriffs' actions. *Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991); *Parker v. Amerson*, 519 So.2d at 442. *See also Cofield v. Randolph County Commission*, 844 F. Supp. 1499, 1502 (M.D. Ala. 1994) (dismissing county from § 1983 suit because, under Alabama law, a county may not be held vicariously liable for sheriff's actions). Moreover, as state executive officers, Alabama sheriffs generally are protected by the state's sovereign immunity under Article I, § 14, of the Alabama Constitution. *Hereford*, 586 So. 2d at 210; *Parker v. Amerson*, 519 So. 2d at

442. Thus, sheriffs enjoy a special status as state officers under Alabama law.

We recognize that a sheriff's designation as a state official is not dispositive, *Parker v. Williams*, 862 F.2d at 1478, but such a designation is relevant to whether a sheriff exercises state or county power. *See Soderbeck II*, 821 F.2d at 451-52; *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 292 (7th Cir.) (*Soderbeck I*) (finding provision of Wisconsin constitution prohibiting county respondeat superior liability for sheriff's acts "powerful evidence" that sheriff is not county policymaker), *cert. denied*, 471 U.S. 1117, 105 S. Ct. 2360, 86 L. Ed. 2d 261 (1985). McMillian would have us disregard Alabama's decision to make a sheriff a state official, characterizing it as nothing more than a label.[4] Instead, we heed the Supreme Court's admonition that federal courts respect the way a state chooses to structure its government. See *Praprotnik*, 485 U.S. at 126, 108 S. Ct. at 925.

We also reject McMillian's argument that *Pembaur* shows that whether a county has law enforcement power is irrelevant. Though the Sixth Circuit did not cite an Ohio county's law enforcement authority as a factor in its decision, we are not convinced that the existence of county law enforcement authority was irrelevant to its decision. The Ohio law cited by the Sixth Circuit strongly suggests that Ohio counties have law enforcement responsibilities beyond simply providing sheriffs with funds. Ohio law provides that "in the execution of the duties required of him, the sheriff may call to

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[4]We recognize that a state cannot insulate local governments from § 1983 liability simply by labelling local officials state officials. *Parker v. Williams*, 862 F.2d at 1479. We base our decision not on a sheriff's "label" but on a county's lack of law enforcement power, of which a sheriff's designation as a state official is evidence.

his aid such persons or power of the county as is necessary." Ohio Rev. Code Ann. § 311.07 (Baldwin 1982). It could be that the Sixth Circuit did not mention this factor because "it is obvious that the Sheriff is a County official," *Pembaur*, 746 F.2d at 341, or simply because the county did not argue that it had no law enforcement power. In any event, regardless of its relevance to the Sixth Circuit, we believe that the existence of county law enforcement power is a prerequisite to a finding that a sheriff makes law enforcement policy for a county.

5. *Our Holding in Parker v. Williams*

Relying on our decision in *Parker v. Williams*, McMillian contends that Alabama counties have the same degree of power in the area of law enforcement that we have found sufficient for county liability in the area of hiring and training jail personnel. In *Parker*, we held that a sheriff exercised county power with final authority when hiring and training a jailer who raped an inmate. 862 F.2d at 1478. We determined that counties, not the State of Alabama, have the responsibility for running jails under Alabama law, because "in practice, Alabama counties and their sheriffs maintain their county jails in partnership." *Id.* at 1478-79.

Inherent in *Parker*'s finding that counties and sheriffs maintain jails "in partnership" was a finding that counties have some duty or authority in the area of running county jails. Put another way, only because Alabama law gives both counties and sheriffs certain power with respect to running county jails could it be said that a county's power in that area takes the form of a partnership with the sheriff. McMillian correctly notes that *Parker* does not require that a municipality act "in partnership" with a government official to be liable for the official's actions. But McMillian errs to the extent that he suggests that *Parker* disavows any requirement that a municipality possess power in

a particular area for an official's actions in that area to be attributed to the municipality. *Parker* holds that a county need not directly control the sheriff to be held liable for the sheriff's actions. 862 F.2d at 1480. It does not even suggest, however, that a county need not have power in an area for a sheriff to be said to exercise county power in that area.

McMillian contends that Monroe County possesses the degree of law enforcement power required by *Parker*. *Parker* listed several features of Alabama law demonstrating that, in practice, counties share authority for running jails with sheriffs. *Parker*, 862 F.2d at 1479. *Cf. Strickler v. Waters*, 989 F.2d 1375, 1390 (4th Cir.) (state law requiring city to fund jail and keep it in good order not enough to render city liable for sheriff's actions in administering jail), *cert. denied*, 126 L. Ed. 2d 341, 114 S. Ct. 393 (1993). McMillian seizes on certain of these features to argue that counties have the requisite power in the area of law enforcement as well. McMillian is correct that certain features of Alabama law with respect to jail maintenance, primarily those relating to county funding of the sheriff's operations, also obtain with respect to law enforcement. But McMillian's analogy fails because important aspects of Alabama law evincing county power in the jail maintenance area find no parallel in the law enforcement area.

As *Parker* notes, for example, in the area of jail maintenance, the county commission is described by state law as the "body having control over the jail," to which the state board of corrections must submit certain jail inspection reports. 862 F.2d at 1479 (citing Ala. Code § 14-6-81). Though not cited in *Parker*, other provisions of the Alabama Code further demonstrate county authority over jails. For instance, the chairman of the county commission has the power to inspect jails weekly and report the results to the grand jury. Ala. Code § 11-12-22. In contrast, Alabama law allocates to counties no

similar powers in the area of law enforcement. County involvement is limited: county voters elect the sheriff and the county funds her operations.[5] Thus, it cannot be said that sheriffs and counties hold power in partnership as in *Parker*, or that counties otherwise possess the degree of law enforcement authority necessary to say that a sheriff exercises county power in that area. But see *Turner v. Upton County*, 915 F.2d 133, 136 (5th Cir. 1990) (holding that sheriff is county policymaker in area of law enforcement by virtue of election by county voters), *cert. denied*, 498 U.S. 1069, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991).[6]

Our conclusion that, under Alabama law, law enforcement is an exercise of state power, whereas jail maintenance is an exercise of county power, accords with our other precedent. McMillian argues that *Lucas v. O'Loughlin*, 831 F.2d 232 (11th Cir. 1987), cert. denied, 485 U.S. 1035, 108 S. Ct. 1595, 99 L. Ed. 2d 909 (1988), and the two Fifth Circuit cases upon which it relied demonstrate that a sheriff is a county policymaker in the area of law enforcement. He

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[5]McMillian seems to suggest that the provision requiring sheriffs to perform certain actions in their respective counties, Ala. Code § 36-22-3(4), amounts to a grant of law enforcement power to counties. It is true that state law limits a sheriff's jurisdiction to her county. But such a geographical limitation on the sheriff's power is fundamentally different from a grant of law enforcement power to the county itself.

[6]We note that the Fifth Circuit seems to view an officer's election by county voters as a significant, if not dispositive, factor in holding counties liable for the officer's actions under § 1983. *E.g.*, *id.*; *Crane v. State of Texas*, 766 F.2d 193, 195 (5th Cir.), *cert. denied*, 474 U.S. 1020, 106 S. Ct. 570 (1985). *But see Keathley v. Vitale*, 866 F. Supp. 272 276 (E.D. Va. 1994) (holding that election is not sufficient basis to attribute sheriff's acts to city). As we have explained, we do not view a sheriff's election by county voters as dispositive, particularly when other factors demonstrate that a sheriff is not exercising county power.

contends that the factors we relied on to hold that a Florida sheriff's termination of a deputy was an act of the county, *id.* at 235, are the same under Alabama law: the sheriff is elected by the county, carries out his duties within the county, is funded by the county, and has absolute authority over the subject matter. He concedes two differences between *Lucas* and his case. *Lucas* involved appointment and control of deputies, while he challenges law enforcement activities; and sheriffs in Alabama are state officers, while sheriffs in Florida are county officers. Nevertheless, McMillian argues that these differences are not dispositive. Once again, we disagree. We have already explained that an Alabama sheriff's designation as a state official is relevant to whether she exercises county law enforcement power; we shall not belabor that point.

We also disagree with McMillian's argument that the type of action challenged makes no difference. He contends that because Sheriff Tate has absolute authority over law enforcement, just as the sheriff in *Lucas* had absolute authority over the termination of his deputy, Sheriff Tate must be a final policymaker for the county in the area of law enforcement. This argument fails for at least two reasons. First, that an official has absolute authority over an area shows only that she is a final policymaker in the area; it says nothing about whose authority she exercises in that area, i.e., whether she is a final policymaker for the county or the state. *Keathley v. Vitale*, 866 F. Supp. at 275. Second, whether the action challenged involves termination of an employee or traditional law enforcement activity is critical to whether a sheriff exercises county or state authority. *Lucas* bears this out.

In holding that the Florida sheriff acted as a county policymaker, *Lucas* relied on the distinction between an official's local power in administrative matters and her state power in other matters. We quoted two Fifth Circuit cases

drawing the distinction between local duties and state duties. *Lucas*, 831 F.2d at 235. *Familias Unidas* distinguished between a Texas county judge's traditional role in the administration of county government and his role in implementing a state statute. *Familias Unidas*, 619 F.2d at 404. In that case, the Fifth Circuit held that the judge's role in implementing a state statute, "much like that of a county sheriff in enforcing a state law," effectuated state policy. *Id.* *Van Ooteghem* similarly distinguished between a county treasurer's "effectuation of the policy of the State of Texas [and] . . . discretionary local duties in the administration of county government," holding that the treasurer's "decisions regarding termination of [an employee] fall on the local not the state side of his duty: he was about the business of county government . . ." *Van Ooteghem v. Gray*, 774 F.2d 1332, 1337 (5th Cir. 1985). In *Lucas*, we determined that the same principle applied to the Florida sheriff's termination of a deputy; thus, the sheriff was about the business of county government, rendering the county liable for his actions under § 1983. *Lucas*, 831 F.2d at 235.

Our holding here that Sheriff Tate is not a final policymaker for Monroe County in the area of law enforcement, because Monroe County has no law enforcement authority, really is just another way of saying that when Sheriff Tate engages in law enforcement he is not about the business of county government. The sheriff in *Lucas*, in contrast, was about the business of county government in terminating a deputy. And the sheriff in Parker was about the business of county government when negligently hiring the jailer. The county and sheriff maintain county jails in partnership, and hiring a jailer falls on the local, administrative side of the sheriff's duties.

We drew this distinction between local, administrative

duties and state duties in our post-Parker decision in *Owens v. Fulton County*, 877 F.2d 947. In *Owens*, we held that a Georgia district attorney acts for, and exercises the power of, the state rather than the county when making prosecutorial decisions. 877 F.2d at 951, 952. Citing *Parker*, we noted that an official simultaneously may exercise county authority over some matters and state authority over others. *Id.* at 952 (citing *Parker*, 862 F.2d at 1479). We found that a Georgia district attorney's relationship to the county involves merely budgetary and administrative matters. *Id.* See also *Parker*, 862 F.2d at 1478 ("The relationship between [the sheriff] and the county . . . is central to the evaluation of whether the county can be liable for [his] actions.") Thus, we determined, a district attorney's acts with respect to budgetary and administrative matters--such as terminating an employee--may be exercises of county authority. But we held that the prosecution of state offenses is an exercise of state authority. *Owens*, 877 F.2d at 952.

B. *Whether Hearsay May Be Used To Defeat Summary Judgment*

In Count Three of his complaint, McMillian alleges that three officials--Sheriff Tate, Larry Ikner, an investigator in the prosecutor's office, and Simon Benson, an Alabama Bureau of Investigation agent--coerced prosecution witnesses into giving false testimony at McMillian's trial and thus knowingly used perjured testimony. The district court granted partial summary judgment to Tate, Ikner, and Benson on McMillian's claim that they coerced Bill Hooks and Joe Hightower into testifying falsely, holding that McMillian had failed to present sufficient evidence to raise a genuine issue of material fact as to whether Tate, Ikner, and Benson coerced Hooks and Hightower or knowingly used their perjured testimony. The district court held that McMillian could not create a genuine issue for trial with

Hooks and Hightower's hearsay statements to Alabama Bureau of Investigation agents because the statements would be inadmissible at trial. In the hearsay statements, Hooks and Hightower say that they were pressured to perjure themselves; now they say in sworn affidavits that they were not coerced and testified truthfully at trial.

McMillian contends that the district court erred in refusing to consider the hearsay evidence on summary judgment. He contends that the Supreme Court's decision in *Celotex* and our decisions in *Church of Scientology* and *Offshore Aviation* permit the use of hearsay to defeat a motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Church of Scientology v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 54 (1994), 130 L. Ed. 2d 13; *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013 (11th Cir. 1987). Tate, Ikner, and Benson contend that the district court properly refused to consider the hearsay. Tate contends that McMillian misreads *Celotex*.

We do not read *Celotex* to permit McMillian to defeat summary judgment with the type of hearsay evidence offered in this case. In *Celotex*, the Supreme Court said:

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally

> expect the nonmoving party to make the showing to which we have referred.

477 U.S. at 324, 106 S. Ct. at 2553. We read this statement as simply allowing otherwise admissible evidence to be submitted in inadmissible form at the summary judgment stage, though at trial it must be submitted in admissible form. *See Offshore Aviation*, 831 F.2d at 1017 (Edmondson, J., concurring).

McMillian does not contend that Hooks and Hightower's statements are admissible for their truth, that is, as substantive evidence that they were coerced into testifying falsely. Nor does McMillian contend that the content of the statements will be reduced to admissible form at trial. He contends that Hooks and Hightower might change their sworn affidavit testimony and admit to being coerced, but a suggestion that admissible evidence might be found in the future is not enough to defeat a motion for summary judgment. McMillian alternatively contends that he can use the statements to impeach Hooks and Hightower if they testify, consistently with their affidavits, that they were not coerced and did not testify falsely at McMillian's criminal trial. While the statements may be admissible for that purpose, the district court correctly noted that such impeachment evidence is not substantive evidence of the truth of the statements alleging coercion. Such potential impeachment evidence, therefore, may not be used to create a genuine issue of material fact for trial. Because Hooks and Hightower's statements will be admissible at trial only as impeachment evidence, the statements do not create a genuine

issue of fact for trial.[7]

Neither *Church of Scientology* nor *Offshore Aviation* holds that inadmissible hearsay may be used to defeat summary judgment when the hearsay will not be available in admissible form at trial. In *Church of Scientology*, we held that the district court should have considered newspaper articles offered as evidence that Clearwater's city commission conducted its legislative process with the intention of singling out the Church of Scientology for burdensome regulation. 2 F.3d at 1530-31. There was no argument that the events recounted in articles could not be proven with admissible evidence at trial, and we expressed no opinion as to whether the articles themselves would be admissible at trial. *Id.* at 1530-31 & n.11. Indeed, there was every indication that witnesses would be able to testify at trial from their personal knowledge of the events recounted in the articles. Here, in contrast, McMillian points to no witness with personal knowledge who will testify at trial that Hooks and Hightower were coerced into testifying falsely.

In *Offshore Aviation*, we held that the district court should have considered a letter offered in opposition to a motion for summary judgment. 831 F.2d at 1015. The party moving for summary judgment argued for the first time on appeal that the letter was inadmissible hearsay. *Id.* We held that the objection to the letter's admissibility was untimely and that the district court should have considered the letter in its summary judgment decision. *Id.* at 1016. We also noted that the fact that the letter itself would be inadmissible at trial did "not undercut the existence of any material facts the letter may

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[7]McMillian also argues that there is other evidence that creates a genuine issue of fact for trial as to whether Tate, Ikner, and Benson coerced Hooks and Highwater into testifying falsely. We agree with the district court that the evidence is insufficient to raise a genuine issue for trial.

[have] put into question." *Id.* at 1015. Though we agree with McMillian that this and certain other language in our opinion suggests that inadmissible hearsay may be used to defeat summary judgment, we do not read *Offshore Aviation* to hold that inadmissible hearsay may be used even when it cannot be reduced to admissible evidence at trial. There was no indication in *Offshore Aviation* that the letter could not be reduced to admissible evidence at trial. Indeed, that the letter at issue was based on the writer's personal knowledge, *id.* at 1016, indicates that there was no impediment to the writer testifying at trial as to the facts described in the letter.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment. AFFIRMED.

PROPST, District Judge, concurring specially:

I concur in Judge Cox's well-reasoned opinion. I write separately only to address the opinion in *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989).

I recognize that *Parker v. Williams* apparently holds that Alabama counties and sheriffs are partners in the operation of jails. I do not agree that Alabama law provides a reasonable basis for such a holding. I respectfully suggest that sheriffs and counties have independent obligations with reference to jails. The counties' sole responsibilities, under Alabama law, relate to the jail facilities.

I find no *Alabama* law which gives counties any authority to run or operate jails. Under Alabama law, the sole authority for "*running*" or *operating* jails and hiring jailors is

placed with sheriffs. In my opinion, the mere fact that counties provide jail facilities and funds for salaries, etc. does not make them "partners" of the sheriff in the operation of jails.[1] Counties have no more "control" over the "running" or operation of jails than they have over law enforcement by the sheriffs. Sheriffs also "hire and train" law enforcement officers with county funds. My full reasoning is addressed in *Turquitt v. Jefferson County*, __ F. Supp. __, (N.D. Ala. Jan. 19, 1996).

[1]"Partneships" generally involve agreements to share profits and losses. I assume that the term "partner" in *Parker* was used in some analogous sense. To the extent that payment of expenses and hiring and training of officers with county funds arguably makes the county a "partner," it would appear to be equally applicable to law enforcement activities.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WALTER MCMILLIAN,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO.
	)	CV-93-A-699-N
W.E. JOHNSON; ET AL,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION
(Filed February 18, 1994)

This cause is now before the Court on the Motions to Dismiss filed by Defendants Tom Tate, Larry Ikner, Simon Benson, Mike Barnett, and Monroe County, Alabama. For the reasons set forth below, the Court finds that the Motions to Dismiss filed by Defendants Tate, Ikner, Benson, and Barnett are due to be granted in part and denied in part. The Motion to Dismiss filed by Defendant Monroe County is due to be granted.

STATEMENT OF FACTS

Because this cause is before the Court on motions to dismiss, the Court accepts the allegations of Plaintiff's First Amended Complaint ("Complaint") as true. The Complaint alleges the following facts:

On November 1, 1986, in the middle of the morning, a woman named Ronda Morrison was murdered in Monroeville, Alabama, inside a business establishment known as Jackson Cleaners. In June of 1987, Plaintiff Walter McMillian was arrested and charged with Ronda Morrison's murder.

Following his arrest, Plaintiff was held in the Monroe County jail. On July 29, 1987, Plaintiff was transferred to the custody of the Alabama Department of Corrections. As a result of the actions of Defendant Tom Tate, Sheriff of Monroe County, Defendant Larry Ikner, an investigator for the Monroe County District Attorney, Defendant Simon Benson, an investigator for the Alabama Bureau of Investigation, and other government officials, Plaintiff was incarcerated on death row in Holman Prison. These Defendants put Plaintiff on death row as a pretrial detainee for the purpose of punishing and intimidating him. Plaintiff remained on death row until his trial approximately one year later.

In August of 1988, Plaintiff was tried for the murder of Ronda Morrison and convicted. In September of 1988, he was sentenced to death.

Defendants Tate, Ikner, and Benson were primarily responsible for the investigation of Ronda Morrison's murder. Plaintiff would not have been prosecuted or convicted but for the fact that these Defendants suppressed a great deal of exculpatory evidence.

Defendants Tate, Ikner, and Benson suppressed evidence related to the testimony of Ralph Myers who was the key witness against Plaintiff. Myers testified, falsely, that

he drove Plaintiff and himself in Plaintiff's truck to Jackson Cleaners on the morning of the murder, and that Plaintiff went inside the Cleaners while Myers waited in the parking lot. Myers testified that he heard gunshots, went inside the Cleaners, and saw Ronda Morrison dead and Plaintiff with a gun.

Defendants Tate, Ikner and Benson suppressed evidence indicating that Myers lied in his testimony. For example, on June 3, 1987, Myers was asked by Defendants Tate, Ikner, and Benson in a tape-recorded interview if Plaintiff had committed or ordered the murder of Ronda Morrison. Myers said that Plaintiff had nothing to do with the murder and offered to take a polygraph examination regarding this matter. From late May, 1987, until at least June 9, 1987, Myers repeatedly told Defendants during interrogations that Plaintiff was not involved in the murder.

Prior to Plaintiff' s trial, Myers was sent to the Taylor-Hardin medical facility for a psychiatric examination. While there, Myers told four hospital staff doctors that he was being pressured and threatened by law enforcement officials to frame an innocent man. Myers was referring to Plaintiff.

On August 27, 1987, a man named Isaac Dailey told Defendant Benson in a tape-recorded statement that Myers had said he was going to frame Plaintiff for still another murder.

All of this exculpatory evidence was known to Defendants Tate, Ikner, and Benson. However, Plaintiff could not use the evidence to defend himself in his criminal trial because these Defendants withheld and suppressed the evidence.

Furthermore, Defendants Tate, Ikner, and Benson pressured and threatened Myers in order to persuade him to give evidence implicating Plaintiff in the murder, evidence these Defendants knew, or should have known, was false. Among other things, these Defendants threatened Myers by telling him he would receive the electric chair if he did not implicate Plaintiff, but Myers would live if he did implicate Plaintiff. Also, these Defendants intimidated Myers by having him incarcerated on death row in 1987, even though Myers had not been convicted of capital murder or sentenced to death. All of this pressure and intimidation eventually caused Myers to implicate Plaintiff and to testify against Plaintiff.

The only other witnesses at the trial who gave testimony indicating that Plaintiff committed the murder were Bill Hooks, Jr. and Joe Hightower. Hooks falsely testified that he drove by Jackson Cleaners the morning of the murder and saw Myers and Plaintiff get into the Plaintiff's truck and drive away. Hightower falsely testified that he saw Plaintiff's truck outside Jackson Cleaners on the morning of the murder.

Defendants Tate, Ikner, and Benson withheld and suppressed evidence relating to both Hooks and Hightower that was exculpatory for Plaintiff. For example, as a result of his willingness to testify falsely against Plaintiff, pending criminal charges against Hooks were dropped, other pending charges against him were never prosecuted, he was relieved from paying several fines he owed as a result of prior convictions, he received money from Defendant Tate, and he was promised an additional reward of $5,000.00 which he received after the trial. In addition to Defendant Tate, Defendants Ikner and Benson knew of these arrangements and helped bring them about.

As a result of his willingness to testify falsely against Plaintiff, Hightower was promised a reward of $2,000.00 or more, which he received after the trial. Defendants Tate, Ikner, and Benson knew of this arrangement and were involved in bringing it about.

Both Hooks and Hightower, when testifying at trial about the truck they saw outside Jackson Cleaners, said the truck was a "lowrider" and low "to the ground." However, Defendants Tate, Ikner, and Benson learned well in advance of the trial that Plaintiff's truck had not been converted into a "low-rider" until several months after the murder.

Defendants Tate, Ikner, and Benson procured Hooks' false testimony in part by having Hooks look at Plaintiff's truck at the Monroe County Jail after Plaintiff had been arrested so Hooks could later describe this truck as the one he saw outside Jackson Cleaners.

Defendants Tate, Ikner, and Benson pressured, threatened, and intimidated Hooks and Hightower, as well as various other people, in an effort to persuade these people to give false evidence implicating Plaintiff in the murder. These Defendants also threatened potential witnesses in an effort to prevent them from coming forward with truthful testimony that would tend to exonerate Plaintiff.

In addition to the foregoing, Defendants Tate, Ikner, Benson, and Barnett, an officer with the Alabama Department of Public Safety, withheld and suppressed evidence exculpatory to Plaintiff that was obtained from a man named Miles Jackson. Jackson gave law enforcement officers a statement that was summarized in an Alabama Department of Public Safety report prepared by Defendant Barnett. In his

statement, Jackson gave information regarding the timing of the murder that undermined the prosecution's theory of how the murder occurred. This evidence was not disclosed to Plaintiff.

Additional exculpatory evidence was suppressed. Defendant Barnett saw the Plaintiff at his home around the time the murder was committed. Thus, Defendant Barnett could have testified to support Plaintiff's alibi defense. However, Defendant Barnett suppressed this evidence. Defendants Tate, Ikner, and Benson also knew of this evidence, yet suppressed it.

More evidence was suppressed. Defendants Tate, Ikner, and Benson suppressed statements from various individuals who gave descriptions of potential suspects near the scene of the crime that did not match the description of Plaintiff. Some individuals also gave descriptions of vehicles near the crime scene that did not match the description of Plaintiff' s truck and contradicted the inculpatory testimony of Hooks and Hightower.

The actual arrest of Plaintiff occurred in June of 1987. Defendants Tate, Ikner, and Benson instigated and planned the arrest of Plaintiff, and Defendant Tate carried out the arrest on June 7. The June 7 arrest was based upon an accusation that Plaintiff committed the crime of sodomy against Ralph Myers in Conecuh County, Alabama. Plaintiff did not commit such crime. Defendants pressured Myers into concocting this phony charge so they could obtain custody of Plaintiff in order to construct evidence against him on the murder charge. However, these Defendants knew, or should have known, that the sodomy charge was false, and there was

no factual basis and no probable cause for believing that Plaintiff committed such a crime.

Defendants Tate, Ikner, and Benson caused an application for a Conecuh County arrest warrant for sodomy, and an affidavit in support of that application, to be submitted when they knew, or should have known, that the affidavit and application contained false information and were insufficient to establish probable cause and to support an arrest warrant. Moreover, these Defendants deliberately omitted crucial exculpatory information from the arrest warrant application and affidavit.

These Defendants timed the arrest of Plaintiff so they could pick him up while he was driving his truck, impound the truck, and take it to the Monroe County jail where Hooks looked at the truck so he could later describe it as the truck he saw outside Jackson Cleaners on the morning of the murder.

Despite Myers' allegation that Plaintiff's act of sodomy took place in Conecuh County, these Defendants arrested Plaintiff and immediately incarcerated him in the Monroe County jail, rather than sending him to Conecuh County. Plaintiff was never sent to Conecuh County to answer the sodomy charges, and the charges were later dismissed.

Defendants Tate, Ikner, and Benson also instigated and carried out the subsequent arrest and prosecution of Plaintiff for the murder of Ronda Morrison. This subsequent arrest occurred on June 8, 1987, while Plaintiff was already in the Monroe County jail as a result of the arrest the previous day. These Defendants knew, or should have known, there

was no probable cause for believing that Plaintiff committed the murder.

These Defendants caused an application and an affidavit to be submitted for a Monroe County arrest warrant for the murder when they knew, or should have known, the application and affidavit contained false information and were insufficient to establish probable cause and to support an arrest warrant. Moreover, these Defendants omitted crucial exculpatory information from the application and affidavit that would have demonstrated a lack of probable cause.

Some time after Plaintiff's arrest on charges of murder, Defendant Tate testified before a grand jury in Monroe County in an effort to obtain an indictment against Plaintiff for the Morrison murder. During that appearance, Defendant Tate gave testimony that he knew or should have known was false, and he deliberately omitted crucial facts that would have been exculpatory for Plaintiff and would have prevented the indictment from being issued. As a result of Defendant Tate's testimony, an indictment was issued against Plaintiff.

Racial discrimination was one of the motives of Defendant Tate in instigating and effectuating the arrest and prosecution of Plaintiff who is black. While Plaintiff was at the Monroe County jail following his June 7, 1987 arrest, Defendant Tate made racist remarks to him and used racial epithets. Defendant Tate, using racial epithets, told Plaintiff he would like to take Plaintiff out back and lynch him just like a black man who recently had been lynched by hanging in Mobile, Alabama.

The prosecution of Plaintiff for murder was instigated, effectuated, and maintained by Defendants Tate, Ikner, and Benson without probable cause, using evidence and testimony they knew, or should have known was false, and suppressing and withholding important exculpatory evidence.

Even after Plaintiff had been convicted and sentenced to death, Defendants Tate, Ikner, and Benson continued to threaten and intimidate potential witnesses in an effort to prevent them from giving exculpatory evidence during post-trial proceedings. In November of 1988, a man named Darnell Houston gave testimony in a hearing on a motion for new trial that contradicted the testimony of Hooks at Plaintiff's trial. According to Houston, Hooks could not have seen Plaintiff's truck outside Jackson Cleaners on the morning of the murder because Hooks was at work all day. In an effort to punish Houston for his testimony, and to discourage other exculpatory witnesses from coming forward, Defendant Tate engineered a prosecution and indictment of Houston for perjury. These perjury charges were later dismissed.

In the years after the trial, a great deal of exculpatory evidence came to light. Myers recanted his testimony implicating Plaintiff. Hooks and Hightower also recanted their inculpatory testimony. Later, Plaintiff discovered the exculpatory evidence that had been suppressed.

In February of 1993, the Alabama Court of Criminal Appeals reversed Plaintiff's conviction because of failure to disclose exculpatory evidence. In March of 1993, the State of Alabama dismissed the charges against Plaintiff, and he was set free after nearly six years on death row for a crime he did not commit. A new investigation was commenced to determine the identity of the person who committed the

murder for which Plaintiff was wrongly arrested and convicted.

On June 4, 1993, Plaintiff filed this action against numerous defendants including Defendants Tate, Ikner, Benson, Barnett, and Monroe County. Plaintiff alleges violations of his rights under the United States Constitution, the Alabama Constitution, and Alabama statutory and common law. Defendants Tate, Ikner, Benson, Barnett, and Monroe County have filed Motions to Dismiss. The Court now considers those motions.

STANDARD OF REVIEW

A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Wright v. Newsome*, 795 F.2d 964, 967 (11th Cir. 1986) ("[W]e may not . . . [dismiss] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief."). A court must accept as true all well-pleaded factual allegations and view them in a light most favorable to the non-moving party. *Hishon*, 467 U.S. at 73; *H.J. Inc. v. Northwestern Bell Tel. Co.* 492 U.S. 229, 249-50 (1989). Moreover, the threshold that a complaint must meet to survive a motion to dismiss for failure to state a claim upon which relief can be granted is "exceedingly low." *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985).

DISCUSSION

Plaintiff's First Amended Complaint ("Complaint"), filed July 14, 1993, contains twenty-seven counts. The first ten counts are brought pursuant to the United States Constitution and 42 U.S.C. § 1983.[1] Counts Eleven through Twenty-Seven are brought pursuant to the Alabama Constitution and the statutory and common law of the State of Alabama.

Defendants Benson and Barnett are sued in their individual capacities only. Defendant Tate and Defendant Ikner are sued in their individual capacities, and in their official capacities as the "Sheriff of Monroe County" and as "an investigator for the Monroe County District Attorney's office," respectively. *First Amended Complaint* ¶¶ 11 and 12. The Court construes the Complaint as alleging federal and state claims against Defendants Tate and Ikner in their official capacities as officers of *Monroe County*, not as officers of the *State of Alabama*.[2] The Court views Count Ten and Count

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[1]To state a claim under § 1983, "a plaintiff must allege facts showing that the defendant's acts or omissions, done under the color of state law, deprived him of a right, privilege, or immunity protected by the Constitution or the laws of the United States." *Emory v. Peeler*, 756 F.2d 1547, 1554 (11th Cir. 1985).

[2]With respect to his federal claims, Plaintiff makes it clear that he is suing Defendants Tate and Ikner in their official capacities as officers of Monroe County, not as officers of the State:

> A suit against an officer in his or her *official* capacity is simply a recharacterization of a claim against the relevant governmental entity. If a judgment against Tate [or Ikner] in his *official* capacity would be paid from the state treasury, it appears that if would be barred by the Eleventh Amendment because it would be--in effect--a suit against the state. If it were paid out of the county treasury, it would not be barred by the Eleventh Amendment because it would be a suit against the county.

Twenty-Seven, both of which allege claims directly against Monroe County based on alleged behavior by Defendants Tate and Ikner, as encapsulating the official capacity claims against Defendants Tate and Ikner.[3] The rest of the counts are construed as alleging individual capacity claims only.

The Court will address the counts in order and only as they apply to Defendants who have moved for dismissal. When the Court refers generally to "Defendants" in the *Discussion* section of this opinion, it is referring only to the Defendants named in the count being discussed.

Count I

The Court holds that Count One sufficiently states a claim upon which relief can be granted. In Count One, Plaintiff alleges that Defendants Tate, Ikner, and Benson

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Parker v. Williams, 862 F.2d 1471, 1476 n.4 (11th Cir. 1989). The distinction is not very important at this stage of the case inasmuch as the county has been sued as a separate defendant with liability premised, in part, on the actions of Tate [and Ikner].

Plaintiff's Response in Opposition to Motion to Dismiss of Defendant Thomas Tate at p. 2 n.1. The Court interprets the Plaintiff's state claims in the same way. That is, Plaintiff intends to sue Monroe County by characterizing his state law claims against Defendants Tate and Ikner as official capacity claims. These official capacity state law claims are encapsulated by Count Twenty-Seven which is alleged as a direct suit against Monroe County.

[3]A § 1983 suit against a government official in his or her official capacity is simply a recharacterization of a suit against the governmental entity the official represents. *Parker v. Williams*, 862 F.2d 1471, 1476 n.4 (11th Cir. 1989). The Court assumes the Plaintiff to be proceeding under a similar understanding as to the state law claims.

violated Plaintiff's rights under the Fourteenth Amendment to the United States Constitution by causing the incarceration of Plaintiff on death row while he was a pretrial detainee. *First Amended Complaint* ¶ 44. Defendants raise four grounds for dismissal of Count One: statute of limitations, Eleventh Amendment immunity, qualified immunity, and lack of authority to order incarceration on death row.

Statute of Limitations: The Court holds that no Defendant sufficiently pleads the statute of limitations defense to warrant dismissal of Count One. All Parties to this action agree that § 1983 actions in Alabama are governed by a two-year statute of limitations. *Lufkin v. McCallum*, 956 F.2d 1104 (11th Cir.), *cert. denied*, 113 S. Ct. 326 (1992). The Parties disagree about when Plaintiff's actions accrued. In the Eleventh Circuit, a § 1983 action accrues when the plaintiff first realizes, or should have realized, (1) that he or she has been injured and (2) who inflicted the injury. *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987). In this case, the Complaint does not allege when Plaintiff realized that he may have been "injured," in the Constitutional sense of the word, by his incarceration on death row. Nor does the Complaint allege when Plaintiff realized who was responsible for that injury. It is up to the defense to raise and prove a statute of limitations defense. *Fed. R. Civ. P.* 8(c). All Defendants raise the statute of limitations defense generally, but none urge its application to Count one specifically. Since no Defendant specifically argues the point, neither does Plaintiff. As a result, the Court is without sufficient facts to determine that Count One is time barred on the basis of the pleadings. The statute of limitations may be raised later as an affirmative defense.

Eleventh Amendment Immunity: The Court holds that the Eleventh Amendment to the United States Constitution does not shield Defendants from suit in their individual capacities. Defendants seem to concede that the absolute immunity of the Eleventh Amendment can shield them from liability only if they are sued in their *official* capacities as state officers.[4] They argue, however, that all of Plaintiff's claims against them, including the ones Plaintiff characterizes as individual capacity claims, are appropriately construed as claims against them in their official capacities as state officers. Defendants reason that any actions they took in connection with Plaintiff's arrest and prosecution were in the course of their work as state officials.

Defendants' argument is contrary to Eleventh Circuit precedent. In *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989), the plaintiff was kidnapped and raped by a county jailer. The plaintiff sued the county sheriff for his hiring of the jailer who had a history of mental problems and drug abuse. The Eleventh Circuit held that the sheriff (a state officer) was not entitled to Eleventh Amendment immunity for claims against him in his individual capacity. *Id.* at 1476. The sheriff was not entitled to Eleventh Amendment immunity even though he hired the jailer in the course of his work as sheriff. Similarly, the Defendants in this case are not entitled to Eleventh Amendment immunity as to the individual capacity claims even if their alleged behavior was in the course of their jobs as state officials. Thus, Defendants are amenable to suit as individuals.

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[4]"[A state official] is not entitled to assert the absolute immunity of the Eleventh Amendment as a defense to actions against him in his individual capacity." *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989).

Qualified Immunity: The Court holds that Count One states a claim against Defendants sufficient to overcome Defendants' qualified immunity. Defendants argue that Count One does not allege that Defendants violated a "clearly established statutory or constitutional right."[5] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). On the contrary, the Supreme Court has "clearly established" the right of a pretrial detainee not to be punished. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). The Supreme Court has also stated that an intent to punish on the part of the relevant governmental officials is indicative of the nature of a particular condition of confinement as "punishment" or not "punishment" in the Constitutional sense. *Id.* at 538. Plaintiff alleges that he was punished as a pretrial detainee by being incarcerated on death row. *First Amended Complaint* ¶ 19. He also alleges that his incarceration on death row was "intended for the purpose of punishing." *Id.* Thus, the Court finds that Count One is sufficient to overcome Defendants' qualified immunity for purposes of a motion to dismiss.

Lack of Authority: Finally, the Court finds that Plaintiff's allegations are sufficient to state a claim despite Defendants' contention that they lacked the authority to decide where Plaintiff would be held prior to trial. Plaintiff alleges that Defendants conspired with those who had the

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[5]"[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

authority to effect Plaintiff's placement on death row. *First Amended Complaint* ¶ 19. Such a conspiracy theory is sufficient to state a § 1983 claim. *See, e.g., Dennis v. Sparks*, 449 U.S. 24 (1980). Thus, Count One survives Defendants' Motions to Dismiss.

Count Two

The Court holds that Count Two sufficiently states a claim upon which relief can be granted. In Count Two, Plaintiff alleges that Defendants Tate, Ikner, Benson, and Barnett violated the Plaintiff's rights under the Fourteenth Amendment to the United States Constitution by withholding and suppressing exculpatory evidence. *First Amended Complaint* ¶ 45. Defendants raise three grounds for dismissal of Count Two: statute of limitations, qualified immunity, and absolute prosecutorial immunity.

Statute of Limitations: The Court holds that Plaintiff's claim under Count Two is not barred by the statute of limitations. As mentioned in the analysis of Count One, all Parties to this action agree that § 1983 actions in Alabama are governed by a two year statute of limitations. *Lufkin v. McCallum*, 956 F.2d 1104 (11th Cir. 1992). The Parties disagree about when Plaintiff*s* actions accrued. In the Eleventh Circuit, a § 1983 action accrues when the plaintiff first realizes, or should have realized, (1) that he or she has been injured and (2) who inflicted the injury. *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987). The Complaint alleges in a number of places that Plaintiff did not discover that exculpatory evidence had been withheld until well within the two-year statutory period. *See e.g., First Amended Complaint* ¶¶ 22 and 28 (alleging that exculpatory

evidence not discovered until 1992). Therefore, the statute of limitations is no bar to Plaintiff's claim under Count Two.

Qualified Immunity: The Court finds that Count Two states a claim sufficient to withstand Defendants' motions based on qualified immunity. Defendants argue that they, as investigators and law enforcement officers, have no independent duty to disclose exculpatory evidence to a criminal defendant. Plaintiff is unable to provide, and the Court does not find, any authority that "clearly establishes" such a duty.[6] Thus, to the extent that Count Two alleges that Defendants withheld evidence from Plaintiff when he was a criminal defendant, the Court holds that Count Two fails to state a claim. The Parties seem to agree, however, that investigators and law enforcement officers have a "clearly established" duty under the Fourteenth Amendment to disclose all exculpatory evidence to the prosecutor who, in turn, must disclose such evidence to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963). The allegations in Plaintiff's Complaint support a theory of liability based on the Defendants' failure to disclose exculpatory material to the prosecution. Thus, the Court holds that the Complaint sufficiently alleges a § 1983 claim based on the violation of Plaintiff's "clearly established" right to be made aware of all exculpatory evidence.

Absolute Prosecutorial Immunity: The Court holds that the doctrine of absolute prosecutorial immunity does not

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[6]For a Constitutional duty, or its corresponding right, to be "clearly established" in Alabama, the duty or right must have been recognized by the United States Supreme Court, the Eleventh Circuit, or the Supreme Court of Alabama at the time the actions at issue occurred. *Courson v. McMillian*, 939 F.2d 1479, 1498 n.32 (11th Cir. 1991).

shield Defendants from liability under Count Two. The Court does not need to address the prosecutorial immunity defense as it applies to Plaintiff's theory that Defendants had a clearly established Constitutional duty to disclose evidence to *Plaintiff* because the Court has already held no such duty had been clearly established. With respect to Plaintiff's theory that Defendants had a Constitutional duty to disclose all exculpatory evidence to the prosecution, the Court holds that prosecutorial immunity does not apply. Defendants argue that when an investigator or law enforcement officer functions as a prosecutor, he or she should have the benefit of the prosecutor's absolute immunity. *See, Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2671 (1993) ("When the functions of prosecutors and detectives are the same. . . . the immunity that protects them is also the same."). The Court finds, however, that an investigator or law enforcement officer is not functioning as a prosecutor when he or she decides which evidence to give to the prosecutor. Therefore, prosecutorial immunity does not shield defendants from liability under Count Two.

Count Three

Since the sufficiency of Count Three[7] is not argued by any Defendant in any brief, the Court will deny the Motions to Dismiss as to Count Three.[8]

Count Four

The Court holds that Count Four sufficiently states a claim upon which relief can be granted. In Count Four, Plaintiff alleges that Defendants Tate, Ikner, and Benson violated Plaintiff's rights under the Fourteenth Amendment to the United States Constitution by instigating and effectuating the malicious prosecution of Plaintiff. *First Amended Complaint* ¶ 47. Defendants raise two grounds for dismissal

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[7]Count Three reads as follows:

> The actions of defendants Tate, Ikner, and Benson . . . in intimidating, threatening, and pressuring witnesses to give false testimony, and the actions of defendants Tate, Ikner, and Benson in threatening and punishing potential witnesses to keep them from giving truthful exculpatory testimony, violated the plaintiff's rights under the Fourteenth Amendment to the United States Constitution.

First Amended Complaint at ¶ 46.

[8]The Court does note that Count Three is not barred by the statute of limitations. (*See* discussion of statute of limitations in *Count Two* section of text of this Opinion). The Plaintiff's Complaint was filed within two years of the discovery of his injury described in Count Three. *See e.g., First Amended Complaint* ¶ 23 (alleging discovery in August of 1991 that witness was pressured by Defendants into giving false testimony against Plaintiff).

of Count Four: the existence of probable cause and the lack of a disposition of the criminal proceedings in Plaintiff's favor. [9]

Probable Cause: The Court holds that Defendants' contention that they had "probable cause" to initiate criminal proceedings against Plaintiff does not defeat Plaintiff's claim under Count Four. The existence of probable cause in a malicious prosecution action is a fact-intensive question. *See, Delchamps, Inc. v. Larry*, 613 So. 2d 1235, 1238 (Ala. 1992) ("The existence of probable cause is determined from the facts of the specific case."). It is inappropriate for a court to decide factual issues on a motion to dismiss. Instead, a court must accept as true the factual allegations in the complaint. Assuming the Plaintiff's allegations in this case are true, the Court holds that a lack of probable cause is sufficiently alleged. Plaintiff alleges that the "prosecution of the plaintiff for murder was instigated, effectuated, and maintained by defendants Tate, Ikner, and Benson without probable cause,

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[9]State law defines the elements of a malicious prosecution action brought in federal court under § 1983. See, *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990) (referring to Alabama law to determine elements of malicious prosecution action under § 1983); See also, *Lippay v. Christos*, 996 F.2d 1490, 1502 (3rd Cir. 1993) ("In determining the elements of the common law tort [of malicious prosecution in a § 1983 case], we look to the law of the forum, in this case, Pennsylvania.").

To state a § 1983 claim for malicious prosecution in Alabama, a plaintiff must allege (1) a judicial proceeding initiated by the defendant; (2) *lack of probable cause*; (3) malice; (4) *disposition of the judicial proceeding favorable to the plaintiff*; and (5) damages. *N.A.A.C.P.*, 891 F.2d at 1563 (emphasis added to reflect issues raised by Defendants).

Since the "favorable disposition" element of Plaintiff's malicious prosecution claim was not satisfied until March 1993, just a few months before he filed suit, there can be no statute of limitations defense to Count Four.

using evidence and testimony they knew or should have known was false, and. suppressing and withholding important exculpatory evidence." *First Amended Complaint* ¶ 35. In other parts of the Complaint, Plaintiff specifies exactly which evidence was fabricated and which evidence was suppressed. These allegations are sufficient to satisfy the "lack of probable cause" element of a malicious prosecution claim.

Lack of Favorable Disposition: The Court holds that Plaintiff's Complaint satisfies the "favorable disposition" element of a malicious prosecution action. Defendants suggest that doubt exists as to whether the criminal proceedings against Plaintiff were terminated in the Plaintiff's favor. Plaintiff's Complaint, however, alleges that the State of Alabama dismissed the criminal charges against Plaintiff in March of 1993. *First Amended Complaint* ¶ 39. The dismissal of criminal charges is sufficient to meet the favorable disposition element of a malicious prosecution action. *See, Chatman v. Pizitz, Inc.*, 429 So. 2d 969, 971 (Ala. 1983). Therefore, Count Four meets the requirement that Plaintiff allege the criminal proceedings were terminated in his favor.

Count Five

The Court is puzzled by Count Five because it does not seem to allege a cause of action distinct from actions alleged in other Counts. Count Five states that Defendants Tate, Ikner, and Benson, in "instigating, effectuating, and maintaining the prosecution of the plaintiff without probable cause violated the plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution." *First Amended Complaint* ¶ 48. To the extent that Count Five alleges a malicious prosecution action, the Court has already

held that such a claim is viable. *See*, This Opinion's Analysis of Count Four. To the extent that Count Five alleges that Plaintiff was the victim of unconstitutional arrests, the Court refers the Parties to this Opinion's analysis of Count Six and Count Seven.

The Court does not think *Barts v. Joyner*, 865 F.2d 1187 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989), bars Plaintiff's malicious prosecution claim. Defendant Tate cites Barts in a section of his brief devoted to Count Five. See, *Brief in Support of Sheriff Tate's Motion to Dismiss Amended Complaint* at 6. Defendant Tate cites *Barts* for the proposition that a law enforcement officer cannot be held liable for damages sustained by a plaintiff as the result of a malicious prosecution once the prosecutor takes the case from the law enforcement officer. Tate concedes, however, that *Barts* does allow a law enforcement officer to be liable where the prosecution was carried out as a result of "deception or undue pressure" by the defendant law enforcement officer. *Barts*, 865 F.2d at 1195. Tate contends that Plaintiff does not allege that he deceived the prosecutor in any way. However,, the Complaint alleges that Defendants Tate, Ikner, and Benson manufactured inculpatory evidence and suppressed exculpatory evidence. If Tate and the other Defendants provided the prosecutor with manufactured evidence and withheld from the prosecutor exculpatory evidence, they clearly deceived the prosecutor and can be held liable for damages sustained by Plaintiff even after the prosecutor took the case. Thus, the Court finds Plaintiff's allegations sufficient to state a malicious prosecution action.

Count Six

The Court holds that Count Six sufficiently states a claim upon which relief can be granted. In Count Six,

Plaintiff alleges that Defendants Tate, Ikner, and Benson violated Plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution by effectuating the arrest of Plaintiff pretextually for the crime of sodomy and by obtaining a warrant for that arrest. *First Amended Complaint* ¶ 49. Defendants raise two grounds for dismissal of Count Six: the existence of probable cause and the lack of involvement in the issuance of the warrant.[10]

Probable Cause: The Court holds that Defendants' contention that they had "probable cause" to effectuate the arrest of Plaintiff for sodomy does not defeat the claim against Defendants under Count Six. The existence of probable cause to make an arrest is a fact-intensive question. It is inappropriate for a court to decide factual issues on a motion to dismiss. Instead, a court must accept as true the factual allegations in the complaint. Assuming the Plaintiff's allegations in this case are true, the Court holds that a lack of probable cause is sufficiently alleged. Plaintiff alleges that he was arrested for sodomy based on an accusation by Ralph Myers that Defendants knew, or should have known, was false. *First Amended Complaint* ¶ 31. Plaintiff alleges that Defendants actually pressured Myers into concocting the accusation. *Id.* Plaintiff also alleges that Defendants caused an application for a Conecuh County arrest warrant for sodomy and a supporting affidavit to be submitted when they knew, or should have known, that the information in it was false and insufficient to establish probable cause. *Id.* Plaintiff

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[10]There is no statute of limitations defense to Count Six apparent on the face of the Complaint because Plaintiff alleges that he did not know the facts surrounding his arrest on the sodomy charge until August of 1991. *First Amended Complaint* ¶ 31. (*See* discussion of statute of limitations in *Count Two* section of text of this Opinion.).

alleges that Defendants deliberately omitted crucial exculpatory information from the warrant application and affidavit. *Id.* Plaintiff alleges that all these actions were taken in bad faith and for the purpose of constructing a case against Plaintiff for the crime of murder. *Id.* These allegations are sufficient to survive Defendants' Motions to Dismiss.

Lack of Involvement in the Issuance of the Warrant: Defendants' argument that they were not involved in the issuance of the warrant for the arrest of Plaintiff on the sodomy charge is also insufficient to warrant dismissal of Count Six. Once again, the Court must accept Plaintiff's allegations as true. Plaintiff alleges that Defendants "caused an application for a Conecuh County arrest warrant for sodomy" to be submitted. *First Amended Complaint* ¶ 31. Plaintiff also alleges that Defendants "instigated and planned the arrest of the plaintiff, and defendant Tate carried out the arrest." *Id.* Thus, according to Plaintiff's allegations, which must be accepted as true, Defendants were involved in all aspects of the arrest of Plaintiff on sodomy charges, including the issuance of the warrant.

Count Seven

The Court holds that Count Seven sufficiently states a claim upon which relief can be granted. In Count Seven, Plaintiff alleges that Defendants Tate, Ikner, and Benson violated Plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution under all the facts and circumstances alleged by effectuating the arrest of Plaintiff for the crime of murder, by obtaining a warrant for that arrest, and by continuing to incarcerate Plaintiff after that arrest. *First Amended Complaint* ¶ 50. Defendants claim they

had probable cause to effectuate the arrest of Plaintiff on the charge of murder.[11]

Probable Cause: The Court holds that Defendant's contention that they had probable cause to effectuate the arrest of Plaintiff for murder does not defeat the claim against Defendants under Count Seven. As mentioned in this Opinion's discussion of Count Six, the existence of probable cause is a fact-intensive question. The Court will not address the issue of probable cause on these Motions to Dismiss except to decide whether Plaintiff's Complaint sufficiently alleges a lack of probable cause. The Court finds that Plaintiff's Complaint does sufficiently allege a lack of probable. Plaintiff alleges that Defendants knew, or should have known, there was no probable cause for believing Plaintiff had committed the murder of Ronda Morrison. *First Amended Complaint* ¶ 32. Plaintiff alleges that Defendants caused an application and an affidavit to be submitted for a Monroe County arrest warrant when they knew, or reasonably should have known, the application and affidavit contained false information and were insufficient to establish probable cause. *Id.* Plaintiff also alleges that Defendants knowingly omitted crucial exculpatory information from the application and affidavit that would have demonstrated the absence of probable cause. *Id.* These allegations are sufficient to survive Defendants' Motions to Dismiss.

Count Eight

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[11]There is no statute of limitations defense to Count Seven apparent on the face of the Complaint. Plaintiff alleges that he was unaware of the facts which form the basis of Count Seven until August of 1991. *First Amended Complaint* ¶ 32. (See discussion of statute of limitations in *Count Two* section of text of this Opinion.).

The Court holds that Count Eight does not state a claim upon which relief can be granted. In Count Eight, Plaintiff alleges that "[t]he actions of defendant Tate in testifying before the Grand Jury in an effort to obtain an indictment against the plaintiff for murder violated the plaintiff's rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution." *First Amended Complaint* ¶ 51. Plaintiff concedes that such a claim is not cognizable in the Eleventh Circuit. *See, Strength v. Hubert*, 854 F.2d 421, 423-424 (11th Cir. 1988) (holding that grand jury witness was entitled to absolute immunity from 1983 liability for his grand jury testimony). Therefore, Count Eight is due to be dismissed.

Count Nine

Since the sufficiency of Count Nine[12] is not argued by any Defendant in any brief, the Court will deny the Motions to Dismiss as to Count Nine.[13]

Count Ten

Count Ten is due to be dismissed because it does not state a claim upon which relief can be granted. In Count Ten, Plaintiff makes the following allegations:

> Because defendant Tate's edicts and acts may fairly be said to represent official policy for defendant Monroe County, Alabama in matters of criminal investigation and law enforcement, and because the actions of defendants Tate and Ikner were undertaken as part of an unwritten policy and custom, attributable to the defendant

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[12]Count Nine reads as follows:

> The racially discriminatory motives of defendant Tate in instigating and effectuating the arrest and prosecution of the plaintiff, and the racially discriminatory remarks of defendant Tate to the plaintiff after the plaintiff was arrested, violated the plaintiff's rights under the Fourteenth Amendment to the United States Constitution.

First Amended Complaint at ¶ 52.

[13]The Court is not willing to consider the timeliness of Count Nine. It is up to the defense to raise the statute of limitations issue. *Fed. R. Civ. P.* 8(c). While Defendant Tate raises the statute of limitations defense against Plaintiff's claims generally, he does not argue the statute of limitations as to Count Nine specifically. As a result, Plaintiff does not argue the statutes of limitations issue as to Count Nine either. Under these circumstances, the Court finds that Defendant Tate does not sufficiently raise the statute of limitations defense in his Motion to Dismiss.

> Monroe County, Alabama, of withholding exculpatory information in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony, and of instigating unwarranted and malicious criminal prosecutions, defendant Monroe County, Alabama is liable for all of the violations committed by defendant Tate as outlined in Counts One through Nine and for all of the violations committed by defendant Ikner as outlined in Counts one through Seven. For these same reasons, defendants Tate and Ikner are liable not only in their individual capacities, but in their official capacities as well.

First Amended Complaint ¶ 53. Plaintiff makes clear that he is not alleging county liability under a respondeat superior theory, which is not available in § 1983 cases. *See. Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978) ("[A] municipality cannot be held liable under § 1983 on a respondeat superior theory.") . *See also, Dean v. Barber*, 951 F. 2d 1210, 1215 (11th Cir. 1992). Instead, Plaintiff alleges two theories of county liability that have been held valid in § 1983 cases. *See, Parker v. Williams*, 862 F.2d 1471, 1478 (11th Cir. 1989) (discussing both theories). First, Plaintiff alleges the Defendant County is liable for the actions of Defendant Tate because Defendant Tate is a final

policymaker for the county in the area of law enforcement.[14] Second, Plaintiff alleges that the County is liable for the actions of Defendant Tate and Defendant Ikner because their unlawful behavior toward Plaintiff was in accordance with unlawful County policy.[15]

The Court holds that Monroe County cannot be liable for the actions of Defendants Tate and Ikner because Monroe County has no law enforcement authority. The Court bases its holding on the recent Eleventh Circuit decision in *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993), *modified*, 1994 WL 633 (11th Cir. 1994). In *Swint*, the plaintiffs brought a § 1983 action against Alabama law enforcement officials, an Alabama city, and an Alabama county for constitutional violations which allegedly occurred during raids on a nightclub. The plaintiffs alleged the county was liable for the unconstitutional acts of the county's sheriff because the sheriff exercised final policymaking authority for the county in matters of law enforcement. In judging the adequacy of this allegation, the *Swint* court looked first to see whether Alabama counties have any law enforcement authority for the sheriff to exercise. *Id.* at 1450 ("Alabama counties are 'authorized to do only those things permitted or directed by

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[14]Count Ten alleges the actions of Defendant Tate represent official policy for the Defendant County in matters of "criminal investigation and law enforcement." Because it seems to the Court that "criminal investigation" is simply one aspect, or a subset, of "law enforcement," the Court will refer in this Opinion only to "law enforcement."

[15]Suing Monroe County directly for the actions of Defendants Tate and Ikner, as Plaintiff does in Count Ten, is the same as suing Defendants Tate and Ikner in their official capacities as county representatives. *See, Parker v. Williams*, 862 F.2d 1471, 1476 n.4 (11th Cir. 1989). The Eleventh Amendment does not protect an Alabama county from liability under § 1983. *See Parker*, 862 F.2d at 1477.

the legislature of Alabama.'") (citation omitted). Since the plaintiff did not cite any statute or decision indicating that Alabama counties have law enforcement authority, the Court found that no such authority existed. *Id.* at 1450. Given this lack of county authority, the court found it unnecessary to take the next step and consider whether the sheriff was a person capable of making county policy. In granting summary judgment for the county, the court held that an Alabama sheriff "is not the final repository of [an Alabama county's] general law enforcement authority, because it has none." *Id.* at 1451.

Final Policymaker Theory: This Court finds *Swint* dispositive of the county liability issue in this case. As mentioned above, Plaintiff advances two theories for county liability. First, Plaintiff alleges that the County is liable because Defendant Tate exercises final policymaking authority for the County in law enforcement matters. According to *Swint*, this allegation states a claim only if the County has some authority in the area of law enforcement. *Id.* at 1450. To determine whether an Alabama county has law enforcement authority, *Swint* advises litigants to look to statutes and case law. *Id.* If no statute or case indicates that an Alabama county has law enforcement authority, then no such authority exists. *Id.* Like the plaintiffs in *Swint*, the Plaintiff in this case fails to cite the Court to a statute or case that indicates that an Alabama county possesses law enforcement authority.[16] Therefore, Plaintiff's final policymaker theory of county liability must fail, just as the same theory failed in *Swint*.

[16]Later in this Opinion, the Court will discuss the statutes Plaintiff does cite.

Unlawful County Policy Theory: Plaintiff's second theory of county liability is also insufficient. Under his second theory, Plaintiff alleges that the County is liable for the actions of Defendant Tate and Defendant Ikner because their unlawful behavior toward Plaintiff was in accordance with unlawful County policy.[17] According to *Swint*, however, an Alabama county can have no policy concerning law enforcement unless it has the authority to make such policy. *Id.* at 1450-1451. As mentioned above, Plaintiff cites no statute or decision indicating that an Alabama county has authority to make policy in the area of law enforcement. Therefore, any unlawful acts of Defendants Tate and Ikner cannot be said to represent the Defendant County's policy.

Plaintiff's Arguments: The court does not find any of Plaintiff's arguments regarding *Swint* persuasive.[18] Plaintiff argues first that Swint does not control this case because Plaintiff in this case, unlike the plaintiffs in Swint,

[17]Specifically, Count Ten alleges that the Defendant County maintains a policy of "withholding exculpatory information in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giv[ing] truthful exculpatory testimony, and of instigating unwarranted malicious and criminal prosecutions." *First Amended Complaint* at ¶ 53. To the extent that this alleged County policy is carried out by Defendant Tate (a sheriff) and Defendant Ikner (an investigator in the district attorney's office), the Court finds the policy to be a *law enforcement* policy. Therefore, the Court reviews the sufficiency of the allegations in Count Ten with the understanding that the alleged unlawful County policy is a law enforcement policy.

[18]In a letter to the Court dated December 24, 1993, Plaintiff offered its interpretation of the *Swint* decision and advanced several arguments for why *Swint* is not controlling in this case.

cites to statutes indicating that Alabama counties have law enforcement authority. *See, Plaintiff's Response in opposition to Monroe County's Motion to Dismiss First Amended Complaint* at 7-11 (citing and quoting several Alabama statutes). The Court finds the statutes cited by Plaintiff insufficient to bestow upon the County any policymaking authority in matters of law enforcement. Plaintiff cites the Court to statutes that generally limit the sheriff's duties to a particular county, *See, e.g., Ala. Code* § 3622-3; a statute that directs the county to pay the sheriff's salary,; *Ala. Code* § 36-22-16; and a statute that directs the county to provide the sheriff an office and to pay his expense; *Ala. Code* § 36-22-18. While these statutes establish certain links between Alabama counties and sheriffs, the statutes do not give Alabama counties any authority to control law enforcement.[19]

The second argument Plaintiff makes regarding *Swint* also is not persuasive. Plaintiff contends that *Swint* advises against deciding the issue of county liability on a motion to dismiss. Plaintiff argues that he should have a chance to submit evidence in support of his theories for county liability. He points out that there was a city liability issue in the *Swint* case as well as a county liability issue. With respect to the

[19]Compare the case at bar to *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989), a case cited by Plaintiff in which the Eleventh Circuit found that an Alabama county may be liable for the actions of the sheriff in operating the county jail. County liability in that case depended upon whether the county had authority over the jail. The court found that the county did have such authority. However, the court based its findings largely on an Alabama statute which gave the county "control over the jail." *Id.* at 1479. The court found that the county could be liable because "[the county], not the state, has the responsibility for running the county jail under Alabama law." *Id.* In contrast, Plaintiff in this case can point to no authority establishing Monroe County's "control" over criminal investigation or law enforcement.

city, the Eleventh Circuit declined to reverse the district court's denial of summary judgment. The court held that it was inappropriate to decide the question of whether the city police chief was a final policymaker for the city because there was "no evidence in the record concerning the 'relevant customs and practices having the force of law' which would define the distribution of law enforcement authority between the City and the [police chief]." *Swint*, 5 F.2d at 1452.

Plaintiff argues that the *Swint* decision with respect to the city should prevent this Court from disposing of Plaintiff's county liability claim without the benefit of any evidence. The Court disagrees. *Swint* clearly holds that any government entity must have law enforcement authority in order to be liable for the law enforcement actions of a government official. Once it is decided that a government entity does have law enforcement authority, then it is appropriate to address the question of who makes policy for the government entity pursuant to its law enforcement authority. In *Swint*, the Eleventh Circuit held that an Alabama *county* has no law enforcement authority. That holding controls this case. The Eleventh Circuit either found or assumed (because it was obvious)[20] that an Alabama *city* has law enforcement authority. Only after it was satisfied that Alabama cities have law enforcement authority did the Eleventh Circuit deem it necessary to consider evidence regarding the city police chief's ability to exercise that authority.

[20]Alabama statutory law makes it clear that cities have law making and law enforcement authority. *See, e.g., Ala. Code* § 11-45-1 (giving cities power to adopt and enforce ordinances).

Thus, *Swint* unequivocally requires this Court to first consider whether a county has authority in matters of law enforcement. This Court's finding that a county has no such authority is dispositive of the county liability issue in this case. The Court sees no reason to allow Plaintiff a chance to submit evidence in support of a claim that is clearly insufficient. Plaintiff's final argument with respect to the *Swint* case also fails to persuade the Court. Plaintiff attempts to distinguish *Swint* by noting that the county commission was the defendant in that case, while the county itself is the defendant in this case. If the distinction the Plaintiff draws has any relevance, the *Swint* court failed to recognize it. In *Swint*, the Eleventh Circuit used "county" and "county commission" interchangeably. The Court even announced its holding using the term "county:" "We hold that [the sheriff] is not the final repository of Chambers County's general law enforcement authority, because it has none." *Swint*, 5 F.3d at 1451. Like the *Swint* court, this Court holds that Defendant Tate and Defendant Ikner are not final repositories of Monroe County's general law enforcement authority, because it has none. Therefore, Monroe County's Motion to Dismiss is due to be granted as to Count Ten. Likewise, Plaintiff's attempt to characterize Defendants Tate and Ikner as county, rather than state,[21] officials fails, and Plaintiff's official capacity claim against these Defendants is due to be dismissed.

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[21]In Alabama, sheriffs are executive officers of the state. Ala. Const. of 1901, art. V, § 112; *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989). Employees of a district attorney are state employees. *Ala. Code.* § 12-17-220(a) (1975); *Hooks v. Hitt*, 539 So.2d 157, 159 (Ala. 1988).

Counts Eleven through Nineteen

Counts Eleven through Nineteen are due to be dismissed because they fail to state claims upon which relief can be granted. Counts Eleven through Nineteen, which are based on the same facts as Counts One through Nine, allege that Defendants Tate, Ikner, Benson, and Barnett committed numerous violations of the Alabama Constitution and of various Alabama statutes, rules, and regulations. Plaintiff, however, is unable to cite the Court to any Alabama authority similar to § 1983 in the federal context that grants Plaintiff the right to bring an action for money damages against a state actor based solely on violations of these provisions of state constitutional or statutory law. Therefore, Counts Eleven through Nineteen are due to be dismissed.

Count Twenty

The Court holds that Count Twenty sufficiently states a claim upon which relief can be granted. In Count Twenty, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the Alabama common law tort of malicious prosecution by "instigating and effectuating the arrest and prosecution of the plaintiff." *First Amended Complaint* at ¶ 63. Defendants raise five grounds for dismissal of Count Twenty: the statute of limitations, existence of probable cause, lack of a disposition of the criminal proceedings in Plaintiff's favor, absolute immunity, and qualified immunity.

Statute of Limitations: There is no statute of limitations defense to Count Twenty. The statute of limitations for a malicious prosecution action in Alabama is two years. *Ala. Code* § 6-2-38(h). The limitations period does not begin to run until the criminal proceedings against

the plaintiff are terminated. *Blake v. Barton Williams, Inc.*, 361 So. 2d 376, 378-379 (Ala. Civ. App. 1978). Plaintiff alleges that the criminal proceedings against him were terminated in March of 1993. *First Amended Complaint* at ¶ 39. This suit was filed a few months later. Therefore, Plaintiff's malicious prosecution claim is timely.

Probable Cause and Lack of a Favorable Disposition: Neither of these grounds allows dismissal of Count Twenty. Defendants raised these same grounds against Plaintiff's § 1983 malicious prosecution action in Count Four. Because these grounds attack specific elements of a malicious prosecution claim,[22] and because state law defines the elements of a malicious prosecution claim brought under § 1983,[23] the discussion of these grounds in the context of § 1983 (Count Four) applies just as well here in the Alabama common law context (Count Twenty). The Court held these grounds insufficient under Count Four; therefore, they are insufficient here under Count Twenty.

Absolute immunity and Qualified immunity: The Court holds that Plaintiff's allegations are sufficient to

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[22]The elements of a malicious prosecution claim in Alabama are as follows: (1) a prior judicial proceeding; (2) instigated by the defendant; (3) *lack of probable cause*; (4) malice; (5) *termination of the judicial proceeding favorably to the plaintiff*; and (6) damages. *Robinson v. McPherson*, 602 So.2d 352, 354 (Ala. 1992) (emphasis added to reflect the defenses raised by Defendants).

[23]See, *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990) (referring to Alabama law to determine elements of malicious prosecution action under § 1983); *See, also, Lippay v. Christos*, 996 F.2d 1490, 1502 (3rd. Cir. 1993) ("In determining the elements of the common law tort [of malicious prosecution in a § 1983 case], we look to the common law of the forum, in this case, Pennsylvania.")

overcome Defendants' contention that they are immune from all of Plaintiff's state law claims under Article I, § 14, of the Alabama Constitution.[24] The Court bases this holding on the case of *Phillips v. Thomas*, 555 So. 2d 81 (Ala. 1989).

In *Phillips*, like this case, the plaintiffs brought a tort action against state employees, and the state employees raised the defenses of absolute and. qualified immunity. In the *Phillips* opinion, the Alabama Supreme Court indicates that although absolute immunity and qualified (or "substantive") immunity are two distinct defenses, they both derive from the state's sovereign immunity which is established by Article I, § 14, of the Alabama Constitution. Before discussing the absolute immunity and qualified immunity defenses, the court devotes a section of the opinion to the more fundamental concept of sovereign immunity. *Id.* at 83. In this section entitled "When Sovereign Immunity is not Available," the court, referring to individual tort liability, states that "[c]learly, a state officer or employee is not protected by § 14 when he acts willfully, maliciously, illegally, fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of the law." *Id.*

Plaintiff's Complaint clearly alleges willful, malicious, and illegal behavior by Defendants in connection with Plaintiff's arrest and prosecution. *See, First Amended Complaint* ¶ 22 (alleging that Defendants withheld exculpatory evidence); ¶ 26 (alleging that Defendants coerced certain persons into testifying falsely against Plaintiff); ¶ 31 (alleging that Defendants fabricated charges against Plaintiff to obtain an arrest warrant). Since the sovereign immunity

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[24]"[T]he State of Alabama shall never be made a defendant in any court of law or equity."

concept encompasses both absolute and qualified immunity, Plaintiff's allegations of willful, malicious, and illegal behavior are sufficient to overcome both the absolute and qualified immunity defenses to the individual capacity claims. Thus, Count Twenty survives Defendants' Motions to Dismiss.

Count Twenty-one

The Court holds that Count Twenty-one sufficiently states a claim upon which relief can be granted.[25] In Count Twenty-One, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of abuse of process by "instigating and effectuating the arrest and prosecution of the plaintiff." *First Amended Complaint* at ¶ 64. Defendants contend that Count Twenty-One is insufficient because it doesn't contain an allegation that the Defendants used an arrest warrant for an improper purpose.[26]

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[25]The Court is not willing to consider the timeliness of Count Twenty-One. It is up to the defense to raise the statute of limitations issue. *F. R. Civ. P.* 8(c). While all the Defendants raise the statute of limitations defense against Plaintiff's claims generally, no Defendant argues the statute of limitations as to Count Twenty-One specifically. As a result, Plaintiff does not argue the statute of limitations issue as to Count Twenty-One either. Under these circumstances, the Court finds that Defendants do not sufficiently raise the statute of limitations defense in their Motions to Dismiss.

[26]The elements of the tort of abuse of process are (1) malice; (2) the existence of an ulterior purpose; and (3) *an act in the use of process not proper in the regular prosecution of the proceedings. Drill Parts and Service Co. v. Joy Mfg.*, 619 So.2d 1280, 1286 (Ala. 1993) (emphasis added to reflect the defense raised by Defendants).

The Court finds that Plaintiff sufficiently alleges that Defendants used at least the first arrest warrant, the one for sodomy, for an improper purpose. Plaintiff alleges that Defendants used the first arrest warrant to "obtain custody of the plaintiff in order to construct evidence against him on the murder charge." *First Amended Complaint* at ¶ 31. Plaintiff further alleges that the Defendants "timed the arrest of the plaintiff so they could pick him up while he was driving his truck, impound the truck and take it to the Monroe County jail, and have Bill Hooks, Jr. look at the truck so he could then describe it as the truck he saw outside the Jackson Cleaners on the morning of the murder." *Id.* Such behavior by the Defendants is an improper use of an arrest warrant.[27] Thus, Count Twenty-One survives Defendants' Motions to Dismiss.

County Twenty-Two

The Court holds that Count Twenty-Two does not state a claim upon which relief can be granted. In Count Twenty-Two, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of false imprisonment[28] by causing the incarceration of Plaintiff on death row while he was a pretrial detainee. *First Amended Complaint* at ¶ 65. Plaintiff cites, and the Court finds, no authority for the proposition that holding a pretrial detainee in one prison cell

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[27]Such behavior is also sufficient to overcome sovereign immunity. Plaintiff's allegations certainly describe behavior that is "willful, malicious, and illegal." *See*, Court's Discussion of Absolute Immunity and Qualified Immunity under *Count Twenty*.

[28]"False imprisonment consists in the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty." *Ala. Code* § 6-5-170.

instead of another constitutes the tort of false imprisonment. Therefore, Count Twenty-Two is due to be dismissed.

Count Twenty-Three

The Court holds that Plaintiff does not state a claim for false imprisonment in Count Twenty-Three. In Count Twenty-Three, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of false imprisonment by "instigating and effectuating the incarceration of the plaintiff for a crime he did not commit." *First Amended Complaint* ¶ 66. In defense, Defendants cite cases that stand for the proposition that a plaintiff who is arrested pursuant to a valid warrant issued by an authorized official is not entitled to recover damages for false imprisonment.

The Court finds the cases cited by Defendants controlling in this case. The Court finds *Goodwin v. Barry Miller Chevrolet, Inc.*, 543 So. 2d 1171 (Ala. 1989), particularly persuasive. In *Goodwin*, the plaintiff sued two persons for false imprisonment. The plaintiff alleged that defendants lacked probable cause for believing that plaintiff had committed a crime but, nevertheless, caused a warrant for plaintiff's arrest to issue. As a result of the defendants' actions, the plaintiff was arrested, kept in custody overnight, prosecuted and found not guilty. The Alabama Supreme Court affirmed the trial court's grant of summary judgment to defendants and stated

> [Plaintiff] was arrested and jailed under a warrant properly issued by a magistrate. The fact that there is a controversy over whether [defendants] had reasonable cause to have the warrant issue does not affect the underlying validity of the warrant itself.

Id. at 1176. The court went on to quote the Alabama Court of Civil Appeals as follows:

> [If] an arrest is made pursuant to a warrant issued by a lawfully authorized person, neither the arrest nor the subsequent imprisonment is "false," and, as a consequence, the complaining party's action must be one for malicious prosecution.

Id. (*quoting*, *Blake v. Barton Williams, Inc.*, 361 So. 2d 376, 378 (Ala. Civ. App. 1978). In the present case, Plaintiff does not allege that the arrest warrants were issued by persons without authorization. Therefore, *Goodwin* controls, and the Court must hold that Plaintiff fails to state a claim for false imprisonment.[29] Thus, Count Twenty-Three is due to be dismissed.

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[29]The Court does note one difference between *Goodwin* and the case at bar. In *Goodwin*, the Alabama Supreme Court indicated that there was a controversy over whether the defendants had reasonable cause to have the arrest warrant issued. However, the court did not say that defendants were alleged to have provided the magistrate with information they knew was false in order to have the warrant issued. In the present case, Plaintiff alleges that Defendants knowingly used false information as the basis for their warrant applications. See, *First Amended Complaint* ¶¶ 31 and 32. The Court speculates that this difference could be a significant enough to allow a false imprisonment claim in a case such as the instant one. However, Plaintiff fails to cite, and the Court does not find, a case where an Alabama court allowed a false imprisonment claim where the plaintiff alleged that the defendant knowingly supplied the issuing authority with false information. Thus, the Court finds that Count Twenty-Three fails to state a cognizable claim.

Count Twenty-Four

Count Twenty-Four fails to state a claim upon which relief can be granted. In Count Twenty-Four, Plaintiff alleges that Defendants Tate, Ikner, Benson, and Barnett committed the tort of fraud under *Ala. Code* § 6-5-102[30] by "withholding and suppressing exculpatory evidence from the plaintiff when they had a duty to turn it over to the plaintiff." *First Amended Complaint* ¶ 67. Defendants argue that Plaintiff's fraud claim is insufficient because it fails to allege reliance by Plaintiff. Plaintiff seems to concede that he does not allege reliance, but he contends that reliance is not a necessary element of a claim under § 6-5-102. The Alabama Supreme Court has held, however, that reliance is indeed a necessary element of a claim under § 6-5-102. *Crowder v. Memory Hill Gardens, Inc.*, 516 So. 2d 602, 605 (Ala. 1987). Thus, Plaintiff's allegations under Count Twenty-Four fail to state a valid claim.

Count Twenty-Five

The Court holds that Count Twenty-Five is barred by the statute of limitations as to Defendants Ikner and Benson. However, Count Twenty-Five is not barred by the statute of limitations as to Defendant Tate. In Count Twenty-Five, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of outrage, also known as intentional infliction of emotional distress, by causing the incarceration of Plaintiff on death row while he was a pretrial detainee.

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[30]"Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." *Ala. Code* § 6-5-102.

First Amended Complaint ¶ 68. The only ground for dismissal argued as to Count Twenty-Five is the statute of limitations.[31] *See, Motion Brief in Support of Motion to Dismiss for Defendants Ikner and Benson* at 5. In response, Plaintiff cites a statute that contains a ten-year limitations period. *Ala. Code* 6-2-33(3).[32] The Court finds that the normal two-year statute of limitations for outrage claims applies to Defendants Ikner and Benson so as to bar Plaintiff Is claim under Count Twenty-Five as to them. However, the Court finds that the ten-year statute of limitations applies to Defendant Tate so that Count Twenty-Five can be maintained against him.

The Normal Two-Year Statute of Limitations: If not for the ten-year limitations period contained in *Ala. Code* § 6-2-33(3), Count Twenty-Five would be barred by the statute of limitations as to every Defendant. The statute of limitations for the tort of outrage is normally two years. *Archie v.*

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[31]As the Court has already mentioned, the Defendants raise sovereign immunity as a defense to all the state law claims. *See*, Court's Discussion of Absolute and Qualified Immunity under *Count Twenty*. The sovereign immunity defense does not defeat Count Twenty-Five. State officers are not entitled to sovereign immunity if their tortious conduct is "willful" or "malicious." *Id.* Plaintiff's Complaint clearly alleges that Defendants' conduct was willful and malicious when they incarcerated Plaintiff on death row as a pretrial detainee. *See, First Amended Complaint* ¶ 19 ("This pretrial detention of the Plaintiff on Death Row, under the existing conditions on Death Row, amounted to punishment. Moreover, it was intended for the purpose of punishing and intimidating the plaintiff, and was done vindictively and maliciously by the [Defendants]."). Thus, Plaintiff sufficiently states a claim under Count Twenty-Five to survive the sovereign immunity defense.

[32]"The following must be commenced within 10 years: . . . (3) Motions and other actions against sheriffs, coroners, constables, and other public officers for nonfeasance, misfeasance, or malfeasance in office."

Enterprise Hosp. and Nursing Home, 508 So.2d 693, 695 (Ala. 1987). For a continuous[33] tort, such as the outrage claim alleged in Count Twenty-Five, the plaintiff can recover for any damages that occurred within the period of limitations. *Garrett v. Raytheon Co., Inc.*, 368 So. 2d 516, 521 (Ala. 1979); *See also, Continental Casualty Ins. Co. v. McDonald*, 567 So. 2d 1208, 1215-1217 (Ala. 1990) (discussing statute of limitations of an outrage claim based on a continuous tort). In this case, Plaintiff was convicted of capital murder in August of 1988 and sentenced to death in September of 1988. *First Amended Complaint* at *Introduction*. Once a prisoner is sentenced to death, it certainly is appropriate to put that prisoner on death row. Thus, any outrage claim Plaintiff may have for the allegations in Count Twenty-Five must be based on injuries incurred by Plaintiff on or before September 1988.

Since Plaintiff's Complaint was filed on June 4, 1993, over four years after September of 1988, none of Plaintiff's injuries under Count Twenty-Five occurred within the two-year statute of limitations for outrage claims. Normally, therefore, Plaintiff's claim under Count Twenty-Five would be totally barred. Nevertheless, Count Twenty-Five is still viable against any Defendants to whom the ten-year statute of limitations of § 6-2-33(3) applies.

The Ten-Year Statute of Limitations: The Court finds that the ten-year limit of § 6-2-33(3) applies to Defendant Tate, but not to Defendants Ikner and Benson. Section 6-2-33(3)

[33]"[The Alabama Supreme Court] has used the term 'continuous tort' to describe a defendant's repeated tortious conduct which has repeatedly and continuously injured a plaintiff." *Moon v. Harco Drugs, Inc.*, 435 So.2d 218, 220 (Ala. 1983). The Court finds that Plaintiff's allegation that he was incarcerated on death row for an extended period of time describes a continuous tort, if it describes an actionable tort at all.

sets a ten-year limitations period for "[m]otions and other actions against sheriffs, coroners, constables and other public officers for nonfeasance, misfeasance, or malfeasance in office." This statute, on its face, applies to sheriffs. Therefore, at least at this stage of these proceedings, the Court holds that it applies to Defendant Tate who is a sheriff.

The Court does not apply the ten-year statute of limitations to Defendants Ikner and Benson, although they could conceivably be covered by the "other public officers" language contained in § 6-2-33(3). The former Fifth Circuit has construed the "other public officers" language of § 6-2-33(3) to exclude city council members. *Nathan Rodgers Constr. v. City of Saraland*, 670 F.2d 16 (5th Cir. Unit B 1982).[34] That court reasoned that city council members were not sufficiently similar to sheriffs, coroners, and constables who "perform ministerial duties that involve handling or collecting public and private funds, or that otherwise carry a high degree of trust." *Id.* at 20. This Court thinks the same reasoning applies to an investigator for the district attorney (Defendant Ikner) and an investigator for the Alabama Bureau of Investigation (Defendant Benson). Furthermore, it appears to the Court that Defendants Ikner and Benson are "employees," rather than "officers," in the ordinary meaning of those terms. The statute does not refer to employees of public officers. Thus, this Court holds that Defendants Ikner and Benson are not public officers who are covered by the ten-year statute of limitations of § 6-2-33(3).

[34]In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the Eleventh Circuit adopted as binding precedent all decisions issued by any Unit B panel of the Fifth Circuit after October 1, 1981.

Thus, the Court dismisses Count Twenty-Five as it applies to Defendants Ikner and Benson on the grounds that the two-year statute of limitations for the tort of outrage has expired. The Court does not dismiss Count Twenty-Five as it applies to Defendant Tate because the ten-year statute of limitations that applies to him has not expired.

Count Twenty-Six

The Court holds that Count Twenty-Six survives Defendants, Motions to Dismiss. In Count Twenty-Six, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of outrage by "instigating and effectuating the arrest, incarceration, and prosecution of the plaintiff for a crime he did not commit." *First Amended Complaint* ¶ 69. The only ground argued as to Count Twenty-Six is the statute of limitations.[35] The Court finds that the two year statute of limitations for outrage claims, based on the facts alleged in

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[35]As the Court has already mentioned, the Defendants raise sovereign immunity to all the state law claims. *See*, Court's Discussion of Absolute and Qualified Immunity under *Count Twenty*. The sovereign immunity defense does not defeat Count Twenty-Six. State officers are not entitled to sovereign immunity when their tortious conduct is "willful" or "in bad faith." *Id.* Count Twenty-Six sufficiently alleges conduct that was "willful" and "in bad faith." See, *e.g.*, *First Amended Complaint* ¶ 35 ("The prosecution of the plaintiff for murder was instigated, effectuated, and maintained by Defendants Tate, Ikner, and Benson without probable cause, using evidence and testimony they knew or should have known was false, and suppressing and withholding important exculpatory evidence."); *See also*, *First Amended Complaint* ¶ 4 ("The actions of all the various defendants--actions that are described in this complaint--were done willfully, wantonly, maliciously, and in gross and reckless disregard of the rights of the plaintiff under the Constitution of the United States, and the Constitution, statutes, and common law of the State of Alabama."). Thus, Plaintiff sufficiently states a claim under Count Twenty-Six to survive the sovereign immunity defense.

this Count, has not expired. Therefore, Count Twenty Six is still viable.

As mentioned above in the Court's discussion of Count Twenty-Five, the statute of limitations for the tort of outrage is two years. For a continuous tort, such as the outrage claim alleged in Count Twenty-Six, the plaintiff can recover for any damages that occurred within the period of limitations. In this case, Plaintiff was allegedly incarcerated until March of 1993 for a crime he did not commit. *See, First Amended Complaint* ¶ 39. This lawsuit was filed on June 4, 1993. Thus, if the allegations in Count Twenty-Six do amount to tortious conduct, Plaintiff has a claim. Plaintiff may recover from Defendants Ikner and Benson for any injuries that he sustained after June 4, 1991.

With respect to Defendant Tate only, Plaintiff may recover for all of his injuries resulting from his arrest, incarceration, and prosecution for a crime he did not commit. This is true because the ten-year statute of limitations of § 6-2-33(3) applies to Defendant Tate for reasons expressed in this Court's discussion of Count Twenty-Five.

Thus, Count Twenty-Six survives the statute of limitations defense as to Defendants Tate, Ikner, and Benson. Plaintiff may recover from Defendants Ikner and Benson damages for any injuries sustained by Plaintiff after June 4, 1991. Plaintiff may recover from Defendant Tate damages for all injuries sustained by Plaintiff resulting from conduct alleged in Count Twenty-Six.

Count Twenty Seven

The Court holds that Count Twenty-Seven fails to state a claim upon which relief can be granted. In Count Twenty-Seven, Plaintiff makes the following allegations:

> Because defendant Tate and defendant Ikner are employees of defendant Monroe County, Alabama; because defendant Tate's edicts and acts may fairly be said to represent official policy for defendant Monroe County, Alabama in matters of criminal investigation and law enforcement; and because the actions of defendants Tate and Ikner were undertaken as part of an unwritten policy and custom, attributable to the defendant Monroe County, Alabama, of withholding exculpatory information in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony and of instigating unwarranted and malicious criminal prosecutions; defendant Monroe County, Alabama is liable for all of the violations and torts committed by defendant Tate as outlined in Counts Eleven through Twenty-Six and for all of the violations and torts committed by defendant Ikner as outlined in Counts Eleven through Seventeen and Counts Twenty through Twenty-Six.

First Amended Complaint ¶ 70. Defendants argue that Monroe County cannot be liable for the actions of Defendants Tate and Ikner because the County has no law enforcement authority. The Court agrees with Defendants.

First Theory of County Liability: In Count Twenty-Seven, Plaintiff seems to advance three theories of county liability. The first theory is that the Defendant County is liable for the actions of Defendants Tate and Ikner "[b]ecause defendant Tate (a sheriff) and defendant Ikner (an investigator for the district attorney) are employees of defendant Monroe County, Alabama." *First Amended Complaint* ¶ 70. The Court understands this first theory to be based on the concept of respondeat superior. However, the Alabama Supreme Court has held that "[a] sheriff is not an employee of a county for purposes of imposing liability on the county under the theory of respondeat superior." *Parker v. Amerson*, 519 So. 2d 442, 442 (Ala. 1987). This Court thinks the same rule would apply to an investigator in the district attorney's office. *See*, *Hooks v. Hitt*, 539 So. 2d 157 (Ala. 1988) (holding that investigators for district attorneys are state employees). Therefore, Plaintiff's first theory of county liability fails.

Second and Third Theories of County Liability: Plaintiff's second and third theories of county liability also fail. According to Plaintiff's second theory,. the Defendant County is liable "because defendant Tate's edicts and acts may fairly be said to represent official policy for defendant Monroe County, Alabama in matters of criminal investigation and law enforcement."[36] *First Amended Complaint* ¶ 70. Under Plaintiff's third theory, the Defendant County is liable "because the actions of defendants Tate and Ikner were undertaken as part of an unwritten policy and custom,

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[36]Count Twenty-Seven alleges the actions of Defendant Tate represent official policy for the Defendant County in matters of "criminal investigation and law enforcement." Because it seems to the Court that "criminal investigation" is simply one aspect, or a subset, of "law enforcement," the Court will refer in this Opinion only to "law enforcement."

attributable to the defendant Monroe County, Alabama, of withholding exculpatory information in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony, and of instigating unwarranted and malicious criminal prosecutions." *Id.* Plaintiff offers no state law authority to support these two theories.

The Defendant County, on the other hand, offers state authority that the Court finds dispositive of the second and third theories under Count Twenty-Seven. The Defendant County cites the Alabama Supreme Court decision in *King v. Colbert County*, 620 So. 2d 623 (Ala. 1993). In *King*, a prisoner who received an electrical shock from a defective outlet in a county jail brought an action for damages against the county sheriff and the county. The Alabama Supreme Court held that the county could not be held liable for the actions of the sheriff:

> The sheriff's authority over the jail is totally independent of the [county] [c]ommission. Therefore, even if [the sheriff] can be held liable for his conduct as sheriff of [the county], [the county] itself cannot be held vicariously liable for his actions or inaction.

Id. at 625. Nevertheless, the court went on to hold that the county could be held liable for the effects of the defective outlet because Alabama counties had been given, by statute, the duty to maintain their county jails: "Each county within the state shall be required to maintain a jail within their county." *Ala. Code* § 11-14-10.

This Court understands the *King* decision to mean that an Alabama county cannot be held liable for the actions of a state official unless the county has statutory authority over the area of government in which the official acted. In this case, Plaintiff attempts to state a claim against Defendant Monroe County for the law enforcement actions of Defendant Tate, a sheriff, and Defendant Ikner, an investigator for the district attorney's office. Plaintiff, however, fails-to cite the Court to a statute granting Alabama counties law enforcement authority. Thus, the Court finds that Plaintiff's second and third theories of county liability must fail.

Since Plaintiff can offer no authority supporting his claim for county liability, the court holds that Count Twenty-Seven is due to be dismissed as to Monroe County. To the extent that Count Twenty-Seven may assert an official capacity claim against Defendants Tate and Ikner, Count Twenty-Seven is due to be dismissed as to them also.

CONCLUSION

For the foregoing reasons, the following claims survive Defendants' Motions to Dismiss and remain:

1. Tom Tate - 42 U.S.C. § 1983 claims against him in his individual capacity contained in Counts One, Two, Three, Four, Five, Six, Seven, and Nine, and state law claims against him in his individual capacity contained in Counts Twenty, Twenty-One, Twenty-Five and Twenty-Six.

2. Larry Ikner - 42 U.S.C. § 1983 claims against him in his individual capacity contained in Counts One, Two,

Three, Four, Five, Six, and Seven, and state law claims against him in his individual capacity contained in Counts Twenty, Twenty-One, and Twenty-Six.

3. Simon Benson - 42 U.S.C. § 1983 claims against him in his individual capacity contained in Counts One, Two, Three, Four, Five, Six, and Seven, and state law claims against him in his individual capacity contained in Counts Twenty, Twenty-One, and Twenty-Six.

4. Mike Barnett - 42 U.S.C. §1983 claim against him in his individual capacity contained in Count Two.

All other claims are due to be DISMISSED. A separate order will be entered in accordance with this Memorandum Opinion.

DONE, this 18th day of February, 1994.

/s/ W. Harold Albritton, III
W. HAROLD ALBRITTON, III
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WALTER MCMILLIAN,	)	
	)	CASE NO.
Plaintiff,	)	CV-93-A-699
	)	
vs.	)	
	)	
W.E. JOHNSON, ET AL,	)	
	)	
Defendants.	)	

ORDER
(Filed December 13, 1993)

This case is before the Court on the Motion to Intervene filed by the Association of County Commissions of Alabama Liability Self-Insurance Fund ("Fund").

The Fund seeks permissive intervention under Rule 24(b), *Fed. R. Civ. P.*

The Fund asserts that it issued its "Liability Self Insurance Plan Document" to the Monroe County Commission for the period February 1, 1992 to January 1, 1993, renewed on January 1, 1993, for a period of one year. The plan provides claims-made coverage which may cover the Defendants Monroe County and Tom Tate, as Sheriff of Monroe County or individually, as to some, but not all, of the claims made against them in this suit. Since a trial of this case could possibly result in a verdict against these Defendants which would leave

uncertain the specific claims upon which liability was based and, therefore, would leave uncertain the question of whether the Fund should provide indemnity based on the verdict, the Fund asks this Court to adopt the bifurcated trial procedure created for situations such as this by the Alabama Supreme Court in the case of *Universal Underwriters Insurance Co. v. East Central Alabama Ford-Mercury, Inc.*, 574 So.2d 716 (Ala. 1991), which states as follows:

> Under this alternative procedure for permissive intervention, the trial would be bifurcated. In the first phase of the trial, the jury or judge would resolve issues of liability between the plaintiff and the insured defendant. The second phase would occur only if the jury or judge in the first phase rendered a verdict or judgment against the insured defendant. In the second phase, the insurance company would be allowed to enter and try, before the same judge or jury, only the insurance coverage issue.

The plaintiff has objected to the Motion to Intervene.

There appears to be no federal authority for such a bifurcated proceeding. Intervention of right by an insurer who, as in this case, is providing its insured with a defense under a reservation of rights, has consistently been denied (*see e.g., Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989); *Restor-A-Dent Dental Lab v. Certified Alloy Products*, 725 F.2d 871 (2nd Cir. 1984)), and the Fund is not seeking intervention here. There is however, authority for more limited permissive intervention than the Fund seeks, without creating a bifurcated proceeding, for the purpose of attending discovery depositions and proposing special interrogatories and verdict

forms to assist in resolving coverage questions. See *Fidelity Bankers Life Insurance Co. v. Wedco, Inc.*, 102 FRD 41 (D. Nev. 1984); *Plough, Inc. v. International Flavors and Fragrances, Inc.*, 96 FRD (W.D. Tenn. 1982).

After careful consideration, the Court declines to adopt the bifurcated procedure established by the Alabama Supreme Court in *Universal Underwriters*, but finds that it would be appropriate to allow the Fund to intervene for the limited purpose of attending depositions, receiving copies of all discovery, attending the pretrial hearing, and proposing special interrogatories and verdict forms to be submitted to the jury. It should be understood that the Court is not agreeing that such proposed interrogatories and special verdict forms will be used, but is agreeing to allow the intervenor to propose them for the Court's consideration. Further, the Court is not authorizing the Fund to participate in the questioning of witnesses at depositions or to initiate discovery on its own, but only to attend depositions and to receive copies of discovery. It is, therefore, hereby ORDERED that the Association of County Commissions of Alabama Liability Self-Insurance Fund is permitted to intervene in this case for the following limited purposes:

> (1) being advised of and attending all depositions
>
> (2) receiving copies of all discovery and pleadings
>
> (3) attending the pretrial hearing
>
> (4) proposing to the Court special interrogatories and verdict pursuant to Rule 49,

Fed. R. Civ. P., for submission to the jury.

DONE this 13th day of December, 1993.

/s/ W. Harold Albritton, III
W. HAROLD ALBRITTON, III
UNITED STATES
DISTRICT JUDGE

STATUTES AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Article V, § 138 of the Alabama Constitution reads in relevant part as follows:

> A sheriff shall be elected in each county by the qualified electors thereof . . .

Various statutes from the Alabama Code read in relevant part as follows:

§ 36-22-2:

> The sheriff must keep his office at the courthouse.

§ 36-22-3:

It shall be the duty of the sheriff:

* * * *

(2) To attend upon the circuit courts and district courts held *in his county* when in session and the courts of probate, when required by the judge of probate, and to obey the lawful orders and directions of such courts.

(3) The sheriff *of each county* must, three days before each session of the circuit court *in his county*, render to the *county treasury* or custodian of *county funds* a statement in writing and on oath of the moneys received by him *for the county*, specifying the amount received in each case, from whom and pay the amount to the *county treasurer* or custodian of *county funds*.

(4) It shall be the duty of sheriffs *in their respective counties*, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties* and to present a report of the evidence so secured to the district attorney or assistant district attorney *for the county*.

(emphasis added)

§ 36-22-5:

The sheriffs in *their respective counties*, whenever directed to do so in writing by the district attorney or by the attorney general or governor, shall make special investigation of any alleged violation of the law *in their counties* and shall prepare a written report setting forth what information has been obtained as a result of such investigation together with the names of such witnesses as have been secured with a summary of what can be proven by such witnesses, which report shall promptly after its preparation be presented to the official who directed the investigation and, if such official shall be the governor or attorney general, he may present it to any solicitor prosecuting criminal cases *in the county*. The sheriff *of the county* shall proceed promptly by himself or by a competent deputy of experience and fidelity to make such investigation when directed as aforesaid.

(emphasis added)

§ 36-22-6:

(a) The expense of a special investigation when ordered as provided in section 36-22-5 shall be paid *from the county treasury*, upon a warrant properly drawn. After the report is made, the sheriff shall file *with the county commission* a detailed

> sworn statement of his expenses accompanied by the written approval of the officer directing the investigations, and *the county commission* shall audit and allow only so much thereof as it shall find reasonably necessary unless it is approved by the governor or attorney general, in which event they shall allow the money approved. The allowed expenses must be paid in each case *from the county treasury* upon a warrant drawn according to law.

(emphasis added)

§ 36-22-13:

> The books required to be maintained [by the Sheriff] by this article must at all times be open to the inspection of the public, free of charge, and must, at the expiration of his official term, be turned over to his successor in office. When a book has been completely filled or used up it must be deposited and kept in the office of the clerk of the circuit court *of the county*.

(emphasis added)

§ 36-22-16:

> (a) Sheriffs of the several counties in this state shall be compensated for their services by an annual salary payable in equal installments *out of the county treasury*

> as the salaries of other county employees are paid. The annual salary of the sheriff shall be $35,000.00, commencing with the next term of office, unless a higher salary is specifically provided for by law by general or local act hereafter enacted.

(emphasis added)

§ 36-22-17:

> All fees, commissions, percentages, allowances, charges and court costs heretofore collectible for the use of the sheriff and his deputies, excluding the allowances and amounts received for feeding prisoners, which the various sheriffs of the various counties shall be entitled to keep and retain, except in those instances *where the county commission directs* such allowances and amounts to be paid *into the general fund of the county* by proper resolution passed *by said county commission of said county*, shall be collected and paid *into the general fund of the county*.

(emphasis added)

§ 36-22-18:

> *The county commission* shall also furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including

automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office.

(emphasis added)

§ 36-22-19:

The county commission of each of the several counties of the state may, in its discretion and upon application of the sheriff *of the county*, pay the sheriff's membership dues in the Alabama sheriffs association each year and also the sheriff's membership dues in the national sheriffs association each year.

The cost of any such membership dues, upon approval by the county commission, may be paid out of the *general fund of the county commission*.

(emphasis added)

§ 36-22-42:

The *governing body of each county* shall begin deducting on October 10, 1975, and each month thereafter from the salaries of such sheriffs an amount equal to four percent of the monthly salary paid such official up to $25,000.00. Such sum shall be deducted monthly and paid *into the general*

fund of the county.

(emphasis added)

§ 11-1-11:

(a) The county commissions of the several counties of the state are hereby authorized to pay all dues, fees and expenses of the sheriffs, tax assessors, tax collectors, circuit clerks and registers and license commissioners or other like officials in their respective counties that are incurred by such individuals through membership in and/or attendance at official functions of their state organizations

(b) Such dues, fees and expenses may be paid from the general fund of each county.

§ 11-2-30:

Upon the application of five or more resident freeholders of the county, addressed to the judge of the circuit court, and verified by the oath of one or more of the applicants, alleging that the bond of the judge of probate or the clerk of the circuit court or of the sheriff or of the tax assessor or of the tax collector or of the county treasurer is for any cause insufficient and setting forth the grounds upon which the allegation is based, such officer may be required to make a new bond, if, upon the

hearing of such application by the circuit court judge, it shall appear that the bond is for any cause insufficient.

No. 96-542

In The

Supreme Court of the United States

October Term, 1996

WALTER McMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit's determination that, under Alabama law, local sheriffs are not policymakers for the county government is a proper application of this Court's guidance in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989)?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Monroe County, Alabama respectfully requests that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only federal constitutional provision Respondent contends to be directly at issue in the question raised by the Petition for a Writ of Certiorari is the Eleventh Amendment. Resp. App. 1a. The only federal statutory provision involved is 42 U.S.C. § 1983. Pet. App. 81a.

State constitutional provisions which are involved in the issue before the Court include: Ala. Const. of 1901 art. V, § 112, art. V, § 121, art. V, § 138, art. VII, § 174 and Amend. No. 35. State statutory provisions involved include: Ala. Code §§ 36-21-10, 36-21-16, 36-21-46 and 36-22-3 (1975). The texts of these statutory provisions are reproduced in Respondent's Appendix.

STATEMENT OF THE CASE

Upon review of the petitioner's "Statement of the Case", Respondent Monroe County, Alabama does not perceive any misstatements of the facts which would have a bearing on the "question of what issues would

properly be before the Court if certiorari were granted" except the following:

In petitioner's "Statement of the Case," McMillian asserts that "any judgment against Sheriff Tate is likely not to be paid from the state treasury, but by Monroe County through its insurance policy with the Association of County Commissions of Alabama." Pet. 3 (citing Pet. App. 77a). The record does not support petitioner's broad conclusion here. The order referred to by petitioner merely grants permissive and very limited intervention to a self-insurance fund "which *may* cover the defendant Monroe County and Tom Tate, the Sheriff of Monroe County or individually, as to some, but not all of the claims made against them in this suit." *Id.* (emphasis added). Even if the County's self-insurance policy had explicitly covered Sheriff Tate for all claims against him, there would be no waiver of sovereign immunity under Alabama law. *See Alabama State Docks v. Saxon*, 631 So. 2d 943, 946-48 (Ala. 1994).

REASONS NOT TO GRANT THE WRIT

I. THE ELEVENTH CIRCUIT'S DETERMINATION THAT, UNDER ALABAMA LAW, LOCAL SHERIFFS ARE NOT POLICYMAKERS FOR THE COUNTY GOVERNMENT IS A PROPER APPLICATION OF THIS COURT'S GUIDANCE IN *PEMBAUR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986), *CITY OF ST. LOUIS V. PRAPROTNIK*, 485 U.S. 112 (1988), AND *JETT V. DALLAS INDEP. SCHOOL DIST.*, 491 U.S. 701 (1989).

Petitioner challenges the Eleventh Circuit's determination that Alabama sheriffs are not final *county* policymakers in the area of law enforcement primarily because the decision is, in their view, inconsistent with this Court's holding in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (plurality opinion). Indeed, *Pembaur* did accept the Sixth Circuit's conclusion that, under Ohio law, sheriffs and prosecutors are county officials authorized to establish official law enforcement policy for the county. 475 U.S. 476. However, *Pembaur* cannot fairly be characterized as establishing a universal principle, that under the laws of all states, sheriffs will be considered final policymakers for counties with respect to law enforcement activities. To the contrary, *Pembaur* and its progeny recognize that since no two states are going to define policymaking authority identically, the various circuit courts of appeal should make independent evaluations of each state's law and these evaluations are due to be afforded "great deference." *See Pembaur*, 475 U.S. 484 & n. 13; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25 (1988) (plurality opinion); and *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737-38 (1989).

Praprotnik and *Jett* make it clear that the question presented by petitioner must be resolved on the basis of *state* law. *See Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123 (plurality opinion). Because the Eleventh Circuit properly based its decision on an analysis of Alabama law, the holding below is consistent with the legal principles articulated in *Pembaur*.

A. *Pembaur, Praprotnik* and *Jett* Emphasize the Importance of State Law in Determining Who Is a Policymaker and for Whom He Makes Policy; They Do Not Dictate Uniformity of Results When Their Principles Are Applied to Different Local Law Contexts.

In *Pembaur*, this Court wisely refused to delve into the minutiae of Ohio state law and re-examine the Sixth Circuit's basis for holding Ohio counties liable for the misconduct of sheriffs and prosecutors. Instead, the Court merely accepted the Sixth Circuit's determination as being the "definitiv[e] constru[ction] . . . " of Ohio law and proceeded to analyze the county's liability under § 1983 taking the Sixth Circuit's determination as a given. 475 U.S. at 491 (O'Connor, J., concurring). Justice Brennan, in writing for the plurality, consistently referred to the description of Ohio sheriffs as final county policymakers as being the Sixth Circuit's conclusion, not the conclusion of this Court.

> Based upon *its* examination of Ohio law, the *Court of Appeals* found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement.

475 U.S. at 476 (citation omitted) (emphasis added); *see also* 475 U.S. at 484 ("[T]he *Court of Appeals* concluded, based upon *its* examination of Ohio law . . . ") (emphasis added). Because the Sixth Circuit's determination on the issue of final policymaking authority necessarily arises out of state law, 475 U.S. 483, this Court, as is its practice in matters involving state law, afforded the determination "great deference." 475 U.S. 484 n. 13 (*citing United States v. S.A. Empressa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 815, n. 12 (1984), *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 499-500 (1985) (citing cases), and *Bishop v. Wood*, 426 U.S. 341, 345-347 (1976)).

Since *Pembaur* was released, this Court has revisited the question of final policymaking liability in two cases, one of which is not cited in McMillian's Petition for Certiorari. Although neither of the cases involve county sheriffs, both look to state law on the issue and, just as significantly, defer to the court of appeal's construction of state law.

In *City of St. Louis v. Praprotnik, supra*, the Plaintiff, once a management-level city employee, contended that the City demoted him and later terminated his employment without due process of law and in retaliation for the exercise of protected free speech. 485 U.S. at 114-17. Instead of looking to local law to see where final policymaking authority for employment was vested, as *Pembaur* suggested, the court of appeals ignored the most relevant portions of local law and broadly defined the term "municipal policymaker." 485 U.S. at 131. This Court, in reversing the Eighth Circuit, warned that "[A] federal court would not be justified in assuming that municipal policymaking authority lies somewhere other

than where the applicable law purports to put it." 485 U.S. at 126. Furthermore, the Court recognized that since states have "wide latitude" in structuring the powers given to local governments, the question of who retains final policymaking authority will be answered in a variety of ways. 485 U.S. at 124-25.

Most recently, in *Jett v. Dallas Indep. School Dist., supra,* this Court addressed the issue of final policymaking authority in yet another context. In *Jett,* a high school football coach alleged that both the school principal and district superintendent had him demoted and transferred in retaliation for the exercise of protected free speech and because of racial animus. Jett sued the school district contending that the district had delegated to the principal and superintendent final policymaking authority in the matter of employment. From a substantial plaintiff's verdict, the school district appealed on the ground that the plaintiff had failed to prove that the individual defendants' conduct represented official school district policy. The Fifth Circuit Court of Appeals agreed with the school district and reversed on this ground. Although generally affirming the Fifth Circuit's reversal of the district court, this Court remanded the issue of final policymaking authority to the Court of Appeals with instructions for the court to examine Texas law on the issue. 491 U.S. at 737-38. Again, great deference is shown, in this case prospectively, to the court of appeals' determination as to state law. "We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the defendant] possessed final policymaking authority. . . . " *Id.*

Petitioner's insistence that the Eleventh Circuit strayed from the course of this Court's guidance on the issue of final policymaking authority makes the mistake of "overlooking the forest for the trees." While carefully following the guidelines as set out by *Pembaur, Praprotnik,* and *Jett,* the Eleventh Circuit analyzed Alabama law and came to a different conclusion than did the Sixth Circuit in *Pembaur* after analyzing Ohio law. The Eleventh Circuit acknowledged that its duty under *Pembaur, Praprotnik,* and *Jett* was to examine Alabama law to determine whether the sheriff exercises final policymaking authority for the county in the area of law enforcement and then properly fulfilled that duty. *McMillian v. Monroe County, Ala.,* Pet. App. 5a-6a. Its conclusions about the way Alabama allocates its local law enforcement authority are consistent with this Court's pronouncements and are entitled to deference.

B. The Eleventh Circuit Properly Applied the Principles of *Pembaur, Praprotnik* and *Jett* In the Context of Local Law to Determine That Sheriffs in Alabama Are Not Law Enforcement Policymakers for Local Counties.

On pages 5a and 6a of its Opinion, the Eleventh Circuit Court of Appeals sets out general principles of municipal liability which can be gleaned for *Monell, Jett, Praprotnik,* and *Pembaur.* Significantly, McMillian's petition fails to point out exactly where the Eleventh Circuit departed from the principals stated in *Pembaur, Praprotnik,* and *Jett.* Instead, McMillian is content to point out the result of the Sixth Circuit's analysis in *Pembaur,* note the similarities between Ohio sheriffs and Alabama sheriffs,

ignore the stark differences, and demand the same result from the Eleventh Circuit when applying Alabama law. This approach is overly simplistic.

After analyzing this Court's most recent pronouncements on the issue of municipal policymaking liability, the Eleventh Circuit took what it called a "fresh look" at its prior holding in *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993) which had been vacated by this Court on jurisdictional grounds in *Swint v. Chambers County Comm'n*, 513 U.S. ___, 115 S. Ct. 1203 (1995). Pet. App. 6a.[1] In *Swint*, the Eleventh Circuit, facing the identical question presented by the instant case, determined that Alabama sheriffs were not final policymakers for the county with respect to law enforcement. The court's reasoning was founded upon the inescapable conclusion that Alabama counties possessed no law enforcement authority. *Id.* at 7a. In reaffirming the reasoning of *Swint*, the court pointed out how closely associated Alabama sheriffs are with state as opposed to county government. First, Alabama sheriffs are state officers and not county officials and, therefore, counties are not liable for the actions of sheriffs, according to state law, under a *respondeat superior*

[1] Petitioner presumes that because this Court granted certiorari in *Swint* that it must do so again in the instant case. Pet. 18-19. That need not be the case. The Eleventh Circuit, after acknowledging the grant of certiorari in *Swint*, Pet. App. 7a, thoroughly re-analyzed the basis for its finding that Alabama sheriffs exercise no county law enforcement power and reaffirmed its conclusion in *Swint*. The court below specifically addressed the arguments raised by petitioner before this Court. A close examination of the court of appeals' opinion reveals nothing which provides a basis for the granting of certiorari.

theory. *Id.* at 7a. In fact, the "critical question" decided in *Swint*, and re-examined in *McMillian*, was "whether an Alabama sheriff exercises *county power* with final authority when taking the challenged action." *Id.* at 7a (emphasis added). The Eleventh Circuit answered that question in the negative in both *Swint* and *McMillian* because Alabama grants law enforcement authority to sheriffs and not counties. *Id.* at 8a; *see* Ala. Code § 36-22-3(4) (1991) ("It shall be the duty of the *sheriffs* in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to gather evidence of crimes in their counties. . . . ") (emphasis added). This statutory grant of power directly to sheriffs is significant because, under Alabama's governmental structure, county governments can only exercise the authority explicitly granted them by the state legislature. Pet. App. 8a (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)).

The court then explains why it is convinced that a municipality must possess power in a particular area before it can incur liability for an official's actions in that area. Pet. App. 8a. Such a conclusion is rooted in the description of a municipal policymaker as the official with final decisionmaking responsibility "in any given area of a local government's business." *Id.* at 8a (quoting *Praprotnik*, 485 U.S. at 125). Based on that language, the court properly concluded that, in a case like the instant one, the threshold question is "whether the official [was] going about the local government's business" when the alleged violation occurred? *Id.* The opinion then listed a

variety of other circuits which had asked similar questions in similar contexts. *Id.* at 8a-9a.

The court also addresses the illogic of McMillian's position that because the sheriff's law enforcement authority is unreviewable within the county and he possesses no significant law enforcement authority outside the county, the authority he holds must derive *from* the county. If, as *Praprotnik* concludes, different entities can share final policymaking authority, it naturally follows that one policymaker's actions could support municipal liability even though other policymakers possessed final policymaking authority and set different policy. *Id.* at 10a. The court analogized to a scenario where a particular city council could authorize its police department precinct commanders to set their own arrest policies without creating a patchwork quilt of precinct liability; liability would still attach only to the municipality which had delegated its final policymaking authority to each precinct commander. *Id.* at 10a.

In the next major section of the opinion, the court of appeals below addressed McMillian's contention that either this Court's or the Sixth Circuit's ruling in *Pembaur* "controls" the result in the instant case. *Id.* at 11a. The Eleventh Circuit properly observed that this Court's *Pembaur* opinion did not address the question of whether an Ohio sheriff is a county policymaker nor did the decision comment upon the state law factors underlying the Sixth Circuit's conclusion that Ohio sheriffs are county policymakers. *Id.* In *Pembaur*, the sole "question presented [was] whether and in what circumstances, a decision by municipal policymakers *on a single occasion* may satisfy" the *Monell* official-policy requirement. 475 U.S. at 471

(emphasis added).[2] Even if this Court's decision in *Pembaur* can be read to give implicit approval to the Sixth Circuit's reading of Ohio law, that decision would not dictate the same conclusion in this case. As the Eleventh Circuit observed, "Ohio law determined the Sixth Circuit's conclusion[; b]ut Alabama law compels our conclusion." Pet. App. 11a.

The Eleventh Circuit's opinion goes on to refute McMillian's claim that Alabama law and Ohio law are virtually the same in the manner that each allocates law enforcement authority. *Id.* at 12a. While similarities exist, especially in election (by county electors) and fiscal support (county pays salary and funds sheriff's department), significant differences exist. First, under an explicit provision of the Alabama Constitution of 1901, sheriffs are state officers and part of the state executive department. *See* Ala. Const. art V, § 112; *Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987). As stated above, because of their unique relationship with the state, Alabama sheriffs cannot create respondeat superior liability for the counties in which they operate. *See Hereford v. Jefferson Co.*, 586 So. 2d 209, 210 (Ala. 1991); *Parker v. Amerson*, 519 So. 2d at 442. Significantly, the association of sheriffs with the state is so close in Alabama that sheriffs are protected by Alabama's grant of sovereign immunity in Article I, § 14 of Alabama's Constitution. Pet. App. 12a (citing *Hereford*,

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[2] *See also* Brief of Petitioner in No. 84-1160, *Pembaur v. City of Cincinnati* (presenting, as the sole question for review, the following: "Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy as to render a county liable under 42 U.S.C. § 1983?").

586 So. 2d at 210; *Parker v. Amerson*, 519 So. 2d at 442). Clearly, Alabama's constitutional and statutory establishment of its sheriffs as state executive officers is much more substantial than McMillian's characterization of it as an "occasional label." There is nothing comparable in Ohio law which so closely identifies sheriffs with the state. *See* Pet. App. 12a.

C. Additional aspects of Alabama law support the conclusion that sheriffs are not final policymakers for the county in the field of law enforcement.

Besides the aspects of Alabama law mentioned in its opinion, other state law considerations undergird the Eleventh Circuit's determination.

Alabama, like all other states, has both a state government and county governments. Ala. Code § 11-1-1. Unlike in many states, however, Alabama counties do not have "home rule" powers and are restricted to performing relatively narrow functions expressly delegated to them by state law. These functions primarily involve construction and maintenance of the county road system, a county courthouse, and a county jail.[3] *See id.*, §§ 11-3-10, 11-3-11, 11-14-10. There is no statute authorizing counties to engage in law enforcement.

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[3] This Court recognized just four years ago that the "principal function" of county commissions in Alabama "is to supervise and control the maintenance, repair, and construction of county roads." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 493-94 (1992) (citing Ala. Code §§ 11-3-1, 11-3-10).

The nature of functions of the office of sheriff in Alabama are also specified by state law. There is a sheriff in each county of the State, elected by the voters of that county. Ala. Const. art. V, § 138. As mentioned above, under the Alabama Constitution of 1901, sheriffs are specifically designated as *state* executive officials. *Id.* § 112 ("The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, *and a sheriff for each county.*") (emphasis added). As a result, they share the same sovereign immunity and Eleventh Amendment immunity accorded to other state officials. *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987).

Sheriffs in Alabama have three basic functions: assisting the state judicial system by serving process and performing other related tasks, Ala. Code § 36-22-3(1); operating the jail, *Id.* § 14-6-1; and enforcing state law in their county, *Id.* § 36-22-3(4). With respect to judicial functions, the sheriffs take orders from, and are supervised by, state judges when they are sitting in their counties.[4] With respect to jail operations, they receive general supervision from the Alabama Department of Corrections. *See id.* §§ 14-6-84, 14-6-85, 14-6-86, 14-6-90, and

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[4] The primary trial court in the Alabama judicial system is the circuit court. There are forty judicial circuits, some of which are limited to one county while others encompass multiple counties. The presiding judge of each circuit exercises "general supervision" over the sheriff or sheriffs in the circuit. Ala. Code § 12-17-24. Other judges may also direct the activities of sheriffs with respect to particular matters. *Id.* § 36-22-2(3).

14-6-98. In the area of law enforcement, sheriffs are not supervised on a day-to-day basis, but they can be directed to perform criminal investigations and make reports about those investigations by the governor, the state attorney general or the district attorney. *Id.* § 36-22-5.[5] Moreover, the governor is authorized to require sheriffs to provide "information in writing, under oath," concerning the conduct of their duties. Ala. Const. art. V, § 121.

The 1901 Constitution also specified that sheriffs may be removed from office for misconduct only through an original impeachment action in the Alabama Supreme Court, generally initiated by the state attorney general at the request of the governor. Ala. Const. art. VII, § 174. This was a change from the former system, under which sheriffs were impeached at the local level. Ala. Const. art. VII, § 3 (1875).[6] The change was made in order to tighten central control over sheriffs, in response to the perception that "the neglect of sheriffs" had led to an "excessive number of lynching cases in Alabama." *Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987). At that time, "the failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism . . . led [the Governor] to believe that sheriffs must be held accountable to a higher and more central

[5] District attorneys, in turn, are state employees elected to perform prosecutorial functions for a given judicial circuit. Ala. Code § 12-17-180.

[6] A very similar provision, covering removal by county courts of various specified "county officers" and city officials, but *excluding* sheriffs, was retained in the 1901 Constitution. Ala. Const. art. VII, § 175.

authority, the Supreme Court, and that this accountability would operate to guarantee the political rights of prisoners." *Id.* at 443-44; *see also id.* at 444. ("Sheriffs were made more accountable to the supreme executive power of the state, the Governor.").[7]

Alabama law gives county commissions *no* role in the development of policies governing local law enforcement or in the supervision of sheriffs in the performance of their law enforcement duties. *See Lockridge v. Etowah County Comm'n*, 460 So. 2d at 1363; *see also Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989) (noting that county commissions have no authority to hire or fire deputy sheriffs); *King v. Colbert County*, 620 So. 2d 623, 625 (Ala. 1993) (holding that county commissions have no control over jail operations). They do, however, have statutory obligations to provide funds and facilities to be used by sheriffs. *See* Ala. Code § 11-14-10 (duty to maintain a jail); *id.* § 36-22-16 (duty to pay a specified salary to sheriff); *id.* § 36-22-18 (duty to furnish sheriff with necessary quarters, supplies, and automobiles). If a county appropriates an unreasonably small amount of money for these purposes, a sheriff can sue the commission in state court for relief. *See Geneva County Comm'n v. Tice*, 578 So. 2d 1070 (Ala. 1991); *Etowah County Comm'n v. Hayes*, 569 So. 2d 397 (Ala. 1990).

Petitioner argues that "Alabama law and the Alabama courts frequently have expressed the common

[7] The 1901 Constitution also specified that it was an impeachable offense for a sheriff to make a false report to the Governor or to allow a prisoner in the county jail to be removed and killed or injured. Ala. Const. art. V, §§ 121, 138.

understanding of the sheriff as a county-based official setting policy for the county." While the cases cited by petitioner may describe the sheriff as being a county officer in very limited contexts, none of the cases or statutes cited describe the sheriff as acting with county power when he exercises the law enforcement function given him by the state.

II. ALTHOUGH THE LAWS OF INDIVIDUAL STATES VARY IN THE WAY LAW ENFORCEMENT AUTHORITY IS ALLOCATED BETWEEN STATE AND COUNTY GOVERNMENTS, THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PREEMINENCE OF STATE LAW IN THE DETERMINATION OF WHERE FINAL COUNTY POLICYMAKING AUTHORITY IS REPOSED.

Petitioner attempts to manufacture a conflict among the circuit courts of appeal by pointing out that some circuits have found sheriffs to be final policymakers for the county while other circuits have come to the opposite conclusion. Certainly, several circuits, after analyzing local law, have denominated sheriffs to be final policymakers for the county with respect to law enforcement. *See Pembaur v. City of Cincinnati*, 746 F.2d 337, 340-41 (6th Cir. 1984) (finding, upon detailed review of Ohio statutes, Ohio sheriffs to be county officer and final repository of county law enforcement authority); *Turner v. Upton County, Tex.*, 915 F.2d 133, 136 (5th Cir. 1990) (considering "unique structure of county government in Texas," Court finds the county liable for the sheriff's acts and acknowledges that "[it] has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the

area of law enforcement. . . . "); *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991) (Applying Washington state law, court finds the sheriff to possess final authority for the training of his deputies); and *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) (finding, based upon Arizona law, county liable for sheriff's law enforcement-related misconduct). Even the Eleventh Circuit can be added to this list since it found that, under Florida law, sheriffs are final policymakers with respect to county law enforcement. *See Lucas v. O'Loughlin*, 831 F.2d 232, 234-35 (11th Cir. 1987).

At least two other circuit courts, after analyzing the laws of a particular state within their circuit, have refused to find that sheriffs are the final policymaking authority for the county. *See Soderbeck v. Burnett County, Wis.*, 821 F.2d 446 (7th Cir. 1987) (holding county not liable for acts of sheriff because Wisconsin Supreme Court had conclusively ruled that Wisconsin sheriffs are state officers accountable only to the state); *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988) (holding that Oklahoma counties were not liable for the acts of sheriff deputies because the counties "have no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies"); *see also Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (holding that Cook County Illinois is not responsible for jail personnel policies because the sheriff is the sole authority with respect to jail employees, and the sheriff is "an independently-elected constitutional officer who answers only to the electorate, not to the Cook County Board of Commissioners); *Baez v. Hennessy*, 853 F.2d 73 (2nd Cir. 1988) (holding that New York counties were not liable for county district

attorneys prosecuting criminal matters because the district attorneys, when pursuing prosecutions, represented the state and not the county); *Wing v. Britton*, 748 F.2d 494 (8th Cir. 1984) (finding that Arkansas cities could not be liable for the acts of deputies because under Arkansas law, sheriffs were exclusively responsible for deputies and not cities); *Owens v. Fulton County*, 877 F.2d 947, 950-51 (11th Cir. 1989) (holding that, under Georgia law, district attorneys, when prosecuting state laws, are not final policymakers for the county despite the fact that they are elected solely by county voters).

There is no conflict among the circuits over the preeminence of state law in the determination of whether an official is to be considered a final policymaker for a particular governmental entity. Because the different circuit courts of appeal were merely construing the laws of different states, a variance of results should be expected. *See Praprotnik*, 485 U.S. at 124-25. Apparently, the petitioner would have the circuit courts of appeal abide by a "one size fits all" jurisprudence of final policymaking authority. Not only is such a request illogical, it is directly contrary to the dictates of *Pembaur*, *Praprotnik*, and *Jett*. Regardless of how Ohio, Texas, Florida, or any other state allocates law enforcement authority between state and local government officials, Alabama law, as discussed above, makes it clear that the sheriff, when enforcing the state's criminal code, is a repository of *state* law enforcement authority, not county. Under Alabama law, there is no such thing as county law enforcement authority. The Petition for a Writ of Certiorari should be denied because there is no conflict among the circuits.

III. IMPOSING LIABILITY UPON MONROE COUNTY, GIVEN THE COUNTIES' LACK OF LAW ENFORCEMENT AUTHORITY UNDER ALABAMA LAW, WOULD UNDERCUT THE BASIC FOUNDATIONS OF MUNICIPAL LIABILITY AS ARTICULATED IN *MONELL*.

Although the Eleventh Circuit noted Monroe County's arguments based on *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), Pet. App. 4a, nothing in the opinion indicates it based its holding on these arguments. Nonetheless, the Court should deny certiorari on the alternative basis that a holding in favor of Monroe County is compelled by the reasoning of *Monell*. *Compare Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (affirming the circuit court of appeals on a ground not relied upon by the circuit court). For the reasons stated below, the holding of this Court in *Monell* is extremely important to the question presented to the Court.

A. Petitioner's Argument Cannot Be Squared With the Primary Factor That Led This Court to Recognize Municipal Liability in *Monell* – the Status of Municipalities as Separate "Corporations" Under State Law.

In *Monell*, this Court held that municipalities were "persons" within the meaning of § 1983. The Court based its conclusion on the fact that municipalities are organized as "corporations" under state law and because the Dictionary Act and various Court decisions had determined that by 1871 corporations (including "municipal corporations") were generally treated as "persons" for purposes of statutory analysis. 436 U.S. at 687-89. This

view of municipalities as separate public corporations is a consistent theme throughout the *Monell* opinion and throughout the legislative record analyzed in that opinion. *See, e.g.*, 436 U.S. at 668; *id.* at 669. It was what led the Court to equate municipalities with the other "persons" who could be sued under § 1983 – i.e., individual public officials in their individual capacities. *See, e.g.*, 436 U.S. at 685-86; *see also*, 436 U.S. at 682; *id.* at 707-08 (Powell, J., concurring).

However, accepting the petitioner's position – that Monroe County is liable for policies created by the incumbent in an office that it did not create and cannot control – would require the Court to abandon this concept of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is difficult to imagine how a single corporation could include both a governing board and a separate official vested with unchecked authority to set corporate policy. That reality is reflected in the suits against "municipalities," 436 U.S. at 690, suits against "[l]ocal governing bodies," *id.*, and suits against a local "government as an entity." *id.* at 694. Certainly, the Sheriff of Monroe County is not a municipality, a local governing body or a local government, nor is he an agent thereof.

In essence, petitioner seeks to have the Court adopt a radically different conception of "Monroe County" as a unit of *geography*, which can have "policies" that are set both by the County Commission (including those officials to whom the commission delegates authority) *and* by any other officials authorized by state law to operate in that

geographic area. But it was not suits against units of geography but suits against "municipalities," defined as units of *government*, that the Supreme Court had in mind in *Monell*. *See* 436 U.S. at 694 ("[I]t is when the execution of a government's policy or custom . . . inflicts the injury that the *government* as an entity is responsible under § 1983.") (emphasis added). The only basis for treating municipalities as "persons" under § 1983 was the Supreme Court's understanding in *Monell* of cities and counties as corporate entities with a separate, coherent and cohesive structure and a single governing body. It would make no sense to abandon that understanding and thereby expand municipal liability beyond anything that Congress could have had in mind.

B. McMillian's Argument is Also Inconsistent With the Causation Requirement Recognized in *Monell*.

The tension between petitioner's position and *Monell* is even clearer in light of the Supreme Court's second holding – that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal *policy* of some nature *caused* a constitutional tort." 436 U.S. at 691 (emphasis added); *see also id.* at 694 (allowing municipal liability since the case "unquestionably involve[d] official policy as the *moving* force of the constitutional violation") (emphasis added). In every legal and practical sense, it is absurd to suggest that Monroe County as a municipal corporation (or the Monroe County Commission as its governing body) adopted or ratified a law enforcement policy that caused the alleged violations of petitioner's constitutional rights.

1. *Origins of the Causation Requirement.*

The causation requirement in *Monell* was derived, in part, from the language of § 1983, which creates a right of action against "any person who . . . shall subject or cause to be subjected" any other person to a deprivation of federal rights. As the Supreme Court recognized, this "language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights," but it also "suggests that Congress did not intend § 1983 liability to attach where such causation was absent." 436 U.S. at 692; *see also Pembaur,* 475 U.S. at 478 (stating that "*Monell* is a case about responsibility.").

Even more important to the Court's conclusion was "the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Pembaur,* 475 U.S. at 479 (emphasis in original). This insight was derived from rejection in the House of Representatives of the "Sherman amendment," a proposed addition to the same act that contained § 1983, which, as noted above, would have imposed liability on municipalities whenever private citizens within their borders " 'riotously and tumultuously assembled . . . with intent to deprive' " another person of a federal right. *See Monell,* 436 U.S. at 666 (quoting the first conference version of the amendment); *see also Jett,* 491 U.S. at 726-27.

As the *Monell* Court exhaustively demonstrated, this proposal was defeated on the ground that many of "the

local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local government to create police forces," either directly or through imposition of liability for damages. 436 U.S. at 673; *see also id.* at 680 (quoting Rep. Burchard); Cong. Globe 794 (April 19, 1871) (Rep. Poland); *id.* at 791 (Rep. Willard); *id.* at 795 (Rep. Blair). The *Monell* Court noted that the legislative history reveals "ample support for [Representative] Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly." 436 U.S. at 679. But, having reviewed this history, the Supreme Court in *Monell* concluded that Congress in 1871 did not create the same "Hobson's choice," because, instead of "imposing an obligation to keep the peace" that did not exist in state law, § 1983 applied only where "a municipality . . . was obligated by state law to keep the peace, but . . . had not in violation of the Fourteenth Amendment." *Id.*

2. *Application of the Requirement to This Case.*

The *Monell* causation requirement is implicated here in two ways. First, of course, there is a conflict between petitioner's position and the *Monell* Court's specific holding that § 1983 cannot be read to impose liability on municipalities for failure to enforce the law if state law does not grant them law enforcement powers. As the Eleventh Circuit in *McMillian* held, "Alabama law assigns

law enforcement authority to sheriffs but not to counties." *McMillian v. Johnson*, Pet. App. at 8a (citing with approval *Swint v. City of Wadley, Ala.*, 5 F.3d 1436, 1450 (11th Cir. 1993)). The Monroe County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff. Yet petitioner contends that the County should face potential liability under § 1983 based entirely on the law enforcement actions of Sheriff Tate.

Indeed, under petitioner's theory, the County's only means of avoiding potential liability would be to violate state law and exceed its assigned authority by attempting to control the sheriff. This is precisely the outcome that Congress sought to avoid when it rejected the Sherman amendment on the ground that it would force municipalities to perform law enforcement functions not delegated to them by state law. Thus, here again, petitioner asks the Court to adopt a statutory interpretation that would undercut one of the central understandings expressed in *Monell* itself.

At a more general level, the Court held in *Monell* that a municipality may not be held liable "*solely* because it employs a tortfeasor – or, in other words, . . . on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis in original). It concluded that Congress, having rejected one limited form of vicarious liability based on constitutional concerns in the Sherman amendment, could hardly have intended to authorize a broader form that "would have raised all the constitutional problems associated with the obligation to keep the peace." *Id.* at 693; *see also Jett*, 491 U.S. at 728-29. Petitioner's theory, however, would have the perverse effect of allowing a

form of vicarious liability under § 1983 that is even more extreme than the *respondeat superior* theory rejected in *Monell*.

IV. LOGICALLY, IF A SHERIFF IS A *STATE* OFFICER FOR PURPOSES OF ELEVENTH AMENDMENT IMMUNITY, HE SHOULD NOT BE DEEMED A *COUNTY* POLICYMAKER.

Another alternative ground for denying the Petition is on the basis of the Eleventh Amendment. Before a governmental body can be held liable for the actions of a particular individual policymaker, obviously, the policymaker must be vested by virtue of his office, with the authority to make policy. A policymaker, when setting policy for a governmental entity, necessarily acts in his "official capacity."

The Eleventh Circuit, in interpreting the Eleventh Amendment, has consistently found Alabama sheriffs (executive officers of the state) and their deputies, in their official capacities, to be representatives of the state and not the county. Consequently, suits against them in their official capacity are routinely dismissed based upon lack of jurisdiction. *See Dean v. Barber*, 951 F.2d 1210, 1215 n. 5 (11th Cir. 1992); *Free v. Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989); *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *see also Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1527 (11th Cir. 1990) (holding that Eleventh Amendment immunity also extends to deputy sheriffs in Alabama). In the instant case, the district judge dismissed Sheriff Tate in his official capacity based on his entitlement to Eleventh Amendment Immunity as an officer of the state of Alabama.

McMillian does not challenge the ruling that Alabama sheriffs are state officers for the purpose of the Eleventh Amendment but contends that sheriffs are policymakers for the county nonetheless. These theories are mutually exclusive. A single official cannot simultaneously be both a county policymaker and the equivalent of the state when sued in his official capacity. A sheriff in Alabama, therefore, is necessarily a policymaker for the state and not the county.

CONCLUSION

Based upon the foregoing, Respondent Monroe County, Alabama respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

U.S. Const. amend. XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Ala. Const. of 1901, art. V, § 112.

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.

Ala. Const. of 1901, art V, § 121.

The governor may require information in writing, under oath, from the officers of the executive department, named in this article, or created by statute, on any subject, relating to the duties of their respective offices, and he may at any time require information in writing, under oath, from all officers and managers of state institutions, upon any subject relating to the condition, management and expenses of their respective offices and institutions. Any such officer or manager who makes a willfully false report or fails without sufficient excuse to make the

required report on demand, is guilty of an impeachable offense.

Ala. Const. of 1901, art. V, § 138.

A sheriff shall be elected in each county by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and he shall be ineligible to such office as his own successor; provided, that the terms of all sheriffs expiring in the year nineteen hundred and four are hereby extended until the time of the expiration of the terms of the other executive officers of this state in the year nineteen hundred and seven, unless sooner removed. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

Ala. Const. of 1901, art. VII, § 174.

The chancellors, judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs, may be removed from office

for any of the causes specified in the preceding section or elsewhere in this Constitution, by the supreme court, under such regulations as may be prescribed by law. The legislature may provide for the impeachment or removal of other officers than those named in this article.

Ala. Const. of 1901, amend. No. 35 (amending art. V, § 138).

A sheriff shall be elected in each county by the qualified electors thereof who shall hold office for a term of four years unless sooner removed, and he shall be eligible to such office as his own successor. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grevious [grievous] bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached, under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

Ala. Code § 36-21-10 (1975).

(a) All law enforcement officers employed by any county of this state who is employed as a full-time law enforcement officer shall make at least $1,300.00 per month starting salary.

(b) The provisions of this section may be enforced in any court of competent jurisdiction in this state by an action brought by any citizen seeking a writ of mandamus, mandatory injunction or other proper remedy, and the court trying the cause may order the suspension or forfeiture of the salary, expenses or other compensation of the members of the governing body failing or refusing to comply with the provisions of this section.

(c) Members of the governing body or sheriff of any county are hereby expressly prohibited from requiring law enforcement officers affected by this section to work any more hours than they were normally working in order to circumvent the provisions of this section.

(d) If for any reason any part of this section or its application to any person, body, or situation is held invalid, the remainder of this section and its application to any other person, body, or situation shall not be affected.

(e) The term "law enforcement officer" means any person whose duties involve police work and who are designated law enforcement officers by the Alabama Peace Officers Minimum Standards Act. (Acts 1984, No. 84-409, p. 958.)

Ala. Code § 36-21-46 (1975).

(a) The minimum standards provided in this subsection shall apply to applicants and appointees as law

enforcement officers who are not law enforcement officers in the state on September 30, 1971, and to applicants and appointees who, though law enforcement officers on September 30, 1971, cease to be law enforcement officers before making application for employment as a law enforcement officer or being employed as a law enforcement officer. No city, town, county, sheriff, constable or other employer shall employ any such applicant who is not on September 30, 1971, a law enforcement officer and who continues until the date of his application as a law enforcement officer unless such person shall have first submitted to the appointing authority an application for such employment verified by affidavit of the applicant and showing compliance with the following qualifications:

(1) AGE. – The applicant shall be not less than 19 nor more than 45 years of age at the time of appointment; provided, that for the purpose of calculating his age under this article, the time spent by any applicant on active duty in the armed forces of the United States of America, not exceeding four years, shall be subtracted from the actual age of such applicant who has attained the age of 40 years.

(2) EDUCATION. – The applicant shall be a graduate of a high school accredited with or approved by the state department of education or shall be the holder of a certificate of high school equivalency issued by general educational development.

(3) POLICE TRAINING. – Prior to appointment, the applicant shall have completed at least 240 hours of formal police training in a recognized police training school, which shall

include the Federal Bureau of Investigation Police Training Academy or another training school approved by the commission; provided, that an applicant may be provisionally appointed without having completed the police training prescribed in this subdivision, subject to the condition that he shall complete such training within nine months after provisional appointment; and, should he fail to complete such training, his appointment shall be null and void.

(4) PHYSICAL QUALIFICATIONS. – The applicant shall be not less than five feet two inches nor more than six feet 10 inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.

(5) CHARACTER. – The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law enforcement officer attesting his good reputation.

(b) The foregoing requirements shall not apply to any person who is presently employed as a law enforcement officer in the state and who continues to be so employed when he makes application for or is employed

as a law enforcement officer in a different capacity or for a different employer. (Acts 1971, No. 1981, p. 3224, § 7; Acts 1971, 3rd Ex. Sess., No. 156, p. 4399, § 1.)

Ala. Code § 36-22-3 (1975).

It shall be the duty of the sheriff:

(1) To execute and return the process and orders of the courts of record of this state and of officers of competent authority with due diligence when delivered to him for that purpose, according to law.

(2) To attend upon the circuit courts and district courts held in his county when in session and the courts of probate, when required by the judge of probate, and to obey the lawful orders and directions of such courts.

(3) The sheriff of each county must, three days before each session of the circuit court in his county, render to the county treasury or custodian of county funds a statement in writing and on oath of the moneys received by him for the county, specifying the amount received in each case, from whom and pay the amount to the county treasurer or custodian of county funds.

(4) It shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county.

(5) To perform such other duties as are or may be imposed by law.

Ala. Code § 36-22-16 (1975).

(a) Sheriffs of the several counties in this state shall be compensated for their services by an annual salary payable in equal installments out of the county treasury as the salaries of other county employees are paid. The annual salary of the sheriff shall be $35,000.00, commencing with the next term of office, unless a higher salary is specifically provided for by law by general or local act hereafter enacted.

(b) Such salary shall be in lieu of all fees, compensation, allowance, percentages, charges and costs, except as otherwise provided by law. The sheriff and his deputies shall, however, be entitled to collect and retain such mileage and expense allowance as may be payable according to law for returning or transferring prisoners and insane persons to or from points outside the county. (Acts 1969, No. 1170, p. 2179 § 1; Acts 1971, No. 77, p. 339; Acts 1973, No. 193, p. 229; Acts 1978, No. 538, p. 596; Acts 1981, No. 81-667, p. 1091; Acts 1985, No. 85-518, p. 612.)

No. 96-542

IN THE

Supreme Court of the United States

October Term, 1996

WALTER McMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY MEMORANDUM

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TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

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PETITIONER'S REPLY MEMORANDUM

The same arguments made by the respondent in opposition to the petition here were also made by the respondent in *Swint v. Chambers County Commission*, 115 S.Ct. 1203 (1995), in its unsuccessful effort to persuade this Court to deny certiorari in that case. Indeed, many of the passages of the opposition briefs are almost identical. *Compare* Respondent's Brief in Opposition to Petition for a Writ of Certiorari in the present case ("Op. Cert."), pp. 3-7, 16-18 with Respondent's Brief in Opposition to Petition for a Writ of Certiorari in *Swint v. Chambers County Commission*, No. 93-1636, pp. 3-7, 10-13. Nothing stated by the respondent here demonstrates that the issue is any less important at the present time, or that the conflict in the circuits is any less pronounced, than when this Court granted certiorari in *Swint*.

If anything, the petitioner's argument for certiorari and eventual reversal is even more compelling here than in *Swint*. In *Swint*, there was nothing in the record to indicate whether any judgment against the sheriff would be paid by the state or the county. *See,* Tr. Oral Arg., *Swint v. Chambers County Commission*, No. 93-1696, p. 59 (Jan. 10, 1995). By contrast, in the present case, the record demonstrates that a judgment likely would be paid by the county's self-insurance fund and not by the state. Pet. App. 77a. This suggests that, contrary to the respondent's argument, the sheriff is not the alter ego of the state for Eleventh Amendment purposes. *See, Hess v. Port Authority*, 115 S.Ct. 394, 404 (1994). This bolsters the petitioner's contention that the sheriff is a final policymaker for the county in the area of law enforcement and not a policymaker for the state. Unfortunately, the District Court released the county by granting a motion to dismiss, and therefore did not consider any evidence regarding who would pay the judgment, pet. app. 58a, thus compounding the error in this case.

In connection with this Eleventh Amendment matter, the respondent here cites a number of Eleventh Circuit decisions holding that Alabama sheriffs are entitled to Eleventh Amendment immunity. Op. Cert. at 25. The respondent then states that, in addition to dismissing the county, the District Court in the present case also dismissed the sheriff in his official capacity "based on his entitlement to Eleventh Amendment immunity as an officer of the state of Alabama." *Id.* at 25. The respondent adds: "McMillian does not challenge the ruling that Alabama sheriffs are state officers for the purpose of the Eleventh Amendment but contends that sheriffs are policymakers for the county nevertheless." *Id.* at 26.

The respondent is not correct in terms of what happened in this case or in terms of petitioner McMillian's position.

The District Court specifically noted that the petitioner, as plaintiff, was *not* making an official capacity claim against the sheriff as a representative of the state, but only as a policymaker for the county. Pet. App. 35a-36a and n.2. Thus, the official capacity claim was never decided on Eleventh Amendment grounds, but only as part of the county liability analysis. *Id.* at 35a-36a, 51a-58a.

To the extent it is relevant, the Eleventh Circuit has held in other cases that a sheriff is entitled to Eleventh Amendment immunity in his official capacity, and the petitioner here believes those holdings are entirely wrong. The Eleventh Circuit's rulings to that effect were based on the assumption that suits against sheriffs are a recharacterization of a claim against the State of Alabama. However, that court has also stated that this assumption does not control where the county -- as in the present case -- has been sued directly:

> Because suits against an official in his or her official capacity are suits against the entity the individual represents, we assume that this suit against [Sheriff] Amerson in his official capacity is simply a recharacterization of a claim against the State of Alabama. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). As such, the Eleventh Amendment bars the award of damages for past injuries because such damages would be paid out of state funds. *See generally, Alabama v. Pugh*, 438 U.S. 781 (1978). To the extent this claim may be against [Sheriff] Amerson as representative of the county, [the plaintiff] Parker will suffer no prejudice from a finding that the Eleventh Amendment bars the claim. Parker can and did sue the county directly.

Parker v. Williams, 862 F.2d 1471 (11th Cir. 1989).

The Eleventh Circuit's suggestion in *Parker* and later cases that judgments against Alabama sheriffs are paid by the state is not based on any statute or declaration of state law, nor on any proof adduced in any of the cases. *See, Carr v. City of Florence*, 916 F.2d 1521, 1527-1528 (11th Cir. 1990) (Clark, J., concurring) ("*Parker* conducted no analysis of whether the state of Alabama would be liable for judgments entered against county sheriffs but simply assumed that the state would have to pay the claims. . . . The proceedings below in this case did not establish who would pay a judgment, the state or the county."). In the present case, the fact that the county rather than the state is likely to pay any judgment against the sheriff not only demonstrates the Eleventh Circuit has been wrong in its Eleventh Amendment analysis, but also bolsters the petitioner's contention here that the sheriff is a final county policymaker in the area of law enforcement and is not, contrary to the respondent's claim, the alter ego of the state.

As did the respondent in *Swint* when it opposed certiorari, the respondent here insists that this case is about nothing more than the proper construction of Alabama law. However, the dispute in *Swint*, replicated in the present case, is not over the Eleventh Circuit's construction of state law, but over whether that construction automatically removes counties from any liability for the actions of sheriffs under 42 U.S.C. § 1983. The Eleventh Circuit held that it does. As noted in the petition, pp. 6-17, this Court and several courts of appeals have reached contrary conclusions although the relevant principles of state law were the same in those cases as in Alabama. While the respondent tries to suggest that there is no conflict between the Eleventh Circuit and those other courts of appeals, op. cert. at 16-18, the Eleventh Circuit itself recognized that it is in conflict with the analysis employed by at least one other court of appeals -- the Fifth

Circuit. Pet. App. 16a and n.6.[1]

At pp. 8-12 of its brief here, the respondent points to three features of Alabama law that were the purported basis for the Eleventh Circuit's decision. These are the label of the sheriff as a state official under state law, op. cert. at 11, the absence of county respondeat superior liability for the actions of sheriffs under state tort law, *id.* at 8-9, and the fact that "under Alabama's governmental structure, county governments can only exercise the authority explicitly granted them by the state legislature," with "Alabama grant[ing] law enforcement authority to sheriffs and not counties." *Id.* at 9.

None of these features distinguish Alabama in a relevant way from the states involved in the decisions that are in conflict with that of the Eleventh Circuit. As for the purported state law characterization of Alabama sheriffs as state officials, the Eleventh Circuit specifically held that this point was not dispositive. Pet. App. 7a. If it were, the Eleventh Circuit would be in conflict with the Fifth Circuit's decision in *Crane v. Texas*, 766 F.2d 193, 195 (5th Cir.), *cert.*

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[1] As noted at p. 17 of the respondent's brief, the Seventh Circuit appears to take the same position as the Eleventh on this issue. *See, Soderbeck v. Burnett County*, 821 F.2d 446, 451 (7th Cir. 1987). However, the respondent is incorrect to suggest that the Tenth Circuit also takes the same position. In the case cited by the respondent, *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988), the Tenth Circuit dealt only with whether the County Commissioners had direct supervisory duties with respect to deputy sheriffs, but did not address whether the county was liable for the actions of the sheriff as a final county policymaker. Finally, the respondent is incorrect at p. 18 in its characterization of the Eleventh Circuit's decision involving Florida sheriffs, *Lucas v. O'Loughlin*, 831 F.2d 232, 234-235 (11th Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988). The Eleventh Circuit did not hold that sheriffs are final policymakers in Florida with respect to law enforcement, but held only that they are final policymakers with respect to hiring and firing deputies.

denied, 474 U.S. 1020 (1985), and the Fourth Circuit's decision in *Dotson v. Chester*, 937 F.2d 920, 924, 926, 932 (4th Cir. 1991), as mentioned at pp. 13-15 of the petition for certiorari.[2] As for respondeat superior liability under state law, a state can structure its own tort law principles and immunities as it chooses, but that does not insulate local governments from liability under § 1983. The Eleventh Circuit suggests that such structuring makes a difference under § 1983, while the Fourth and Sixth Circuits have held that sheriffs are final county policymakers irrespective of the fact that counties are not liable for the actions of sheriffs under state law in the states at issue. Pet. Cert. at 15-16, *citing, Dotson v. Chester* and *Marchese v. Lucas*, 758 F.2d 181, 188-189 (6th Cir. 1985). As for the Eleventh Circuit's statement that "Alabama counties have only the authority granted them by the legislature," pet. app. 7a-8a, this is no different from the principle in most states. Counties are creatures of the states and are limited to those powers permitted by state law. *See*, Sands & Libonati, *Local Government Law*, §§ 3.01, 8.01. While the Eleventh Circuit claims that Alabama law makes no specific assignment of law enforcement power to counties independent of the sheriff's power, pet. app. 8a, that also is consistent with the practice in other states.

For it is not as if Ohio, Texas, Arkansas, Massachusetts, Maryland, and Michigan (which are among the states involved in the conflicting cases discussed in the petition) have created situations where county commissioners ride with the sheriff in the patrol car or supervise the sheriff's law

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[2] Moreover, Alabama state law often refers to sheriffs as county officials. *See*, Pet. Cert. 8. *See also*, Ala Code § 36-22-16(a) ("Sheriffs of the several counties . . . shall be compensated . . . by an annual salary payable in equal installments out of the county treasury as the salaries of *other county* employees are paid").

enforcement duties. As in Alabama, the sheriff is the chief law enforcement officer in each county in those states, and there is no assignment of law enforcement power to the counties or other county officials independent of that assigned to the sheriff (except to the extent that the county governing boards control the funding of the sheriff's office, which is true in Alabama and most states). Thus, counties in those other states have no more law enforcement power than do counties in Alabama.[3]

The respondent cites the involvement of state officials in impeachment proceedings against sheriffs. Op. Cert. at 16. Of course, impeachment is a very rare event. *See, Parker v. Amerson*, 519 So.2d 442, 444 n.1 (Ala. 1987) (citing only three cases in the past 100 years dealing with impeachment of sheriffs). Much more relevant is the identity of those persons who have the power to choose the sheriff at each regular election, and to turn out an incumbent candidate if he or she is not performing satisfactorily and lawfully -- the voters of each county. The role of the voters of the county is vastly more important in controlling the activities of the sheriff and in determining who serves and does not serve than the role of state officials on those extremely infrequent occasions when impeachment is attempted. *See, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981)

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[3] The respondent cites the Eleventh Circuit's analogy to a hypothetical situation where a city's precinct police commanders had final authority within their precincts to process arrestees, but their policies remained city policies rather than precinct policies. Op. Cert. at 10, *citing* Pet. App. 10a. Whatever the accuracy of that analysis on its own, it is not a proper analogy to the present case. It would be akin to the present case only if precincts were separate units of local government, if the precinct commander was appointed not by a city police chief but elected by the voters of the precinct, and if the precinct had its own police department funded by a precinct treasury on a budget set by the precinct governing board.

(compensatory damages awarded against a local government under § 1983 "may themselves induce the public to vote the wrongdoers out of office"). This demonstrates that the sheriff sets policy for the county and its citizens rather than for state officials.

The respondent seems to contend that unless the county commissioners themselves supervise and control the sheriff, the sheriff cannot be a county policymaker. Op. Cert. at 15 ("Alabama law gives county commissions no role in the development of policies governing local law enforcement or in the supervision of sheriffs in the performance of their law enforcement duties"); *id.* at 23 ("The Monroe County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff"). This is related to the respondent's assertion that *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), adopted some sort of view of local government as being identical to corporate business governance. Op. Cert. at 19-21. According to the respondent:

> [A]ccepting the petitioner's position . . . would require the Court to abandon [the] concept of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is difficult to imagine how a single corporation could include both a governing board and a separate official vested with unchecked authority to set corporate policy.

Id. at 20.

All of this implies that, for purposes of § 1983, only legislative bodies can make final policy for local governments and only county commissions can make final policy for counties. It ignores the fact that most governments operate

differently than the typical business corporation. Most governments have a separation of powers between executive officials and legislative bodies, with executive officials setting policy in some areas and legislative officials in others.

Thus, in analyzing § 1983, this Court specifically has recognized that government officials other than those in legislative bodies can be final local governmental policymakers.

> [I]t is when execution of a government's policy or custom, *whether* made by its lawmakers *or* by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. New York City Dept. of Social Services, 436 U.S. at 694 (emphasis added).

> [In § 1983 cases], the trial judge must identify those officials *or* governmental bodies who speak with final policymaking authority for the local government[]. . . .

Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989). By noting in *Monell* that local officials other than "lawmakers" can make policy, and in *Jett* that officials other than "governmental bodies" can make policy, this Court clearly has rejected the notion that policy can be made only by legislative bodies.

The respondent's misunderstanding in this regard is akin to that of the Eleventh Circuit, which has said that a delegation of law enforcement power to the sheriff is, by definition, not a delegation to the county. ("Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 8a.) The Eleventh Circuit and the

respondent presuppose that unless some county-based official other than the sheriff has law enforcement power, the county has none. But that is simply wrong. As the Fifth Circuit said in *Turner v. Upton County,* 915 F.2d 133, 137 (5th Cir. 1990):

> The sheriff is an elected county official equal in authority to the county commissioners within that jurisdiction; his actions are as much the actions of the county as the actions of those commissioners.

For the foregoing reasons, as well as those stated in the petition, a writ of certiorari should issue to review the decision of the Eleventh Circuit in this case.

Respectfully Submitted,

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No. 96-542

In The

Supreme Court of the United States

October Term, 1996

WALTER MCMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONERS

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31 pp

QUESTION PRESENTED

Whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported as *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996), and is reproduced in the appendix to the petition for writ of certiorari at 1a. The opinion of the United States District Court for the Middle District of Alabama is unreported and is reproduced in the appendix at 25a. A relevant December 13, 1993 order of the district court is unreported and is reproduced in the appendix at 77a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1996. The petition for writ of certiorari was filed on October 7, 1996, and was granted on December 6, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal statute involved is 42 U.S.C. § 1983. Article V, § 138 of the Alabama Constitution is relevant, as are various provisions of the Alabama Code, including §§ 36-22-2, 36-22-3, 36-22-5, 36-22-6, 36-22-13, 36-22-16, 36-22-17, 36-22-18, 36-22-19, 36-22-42, 11-1-11, and 11-2-30 (1975). All of these provisions are set out at 81a.

STATEMENT OF THE CASE

On March 3, 1993, petitioner Walter McMillian was freed from prison after serving nearly six years on Alabama's death row for a crime he did not commit. Over a year of Mr. McMillian's incarceration on death row took place before he had been tried or convicted of any offense. Pet. App. 26a. Mr. McMillian's release occurred after evidence was uncovered that law enforcement officials had concealed exculpatory records and statements supporting his innocence. The Alabama Court of Criminal Appeals held that Mr. McMillian's due process rights had been violated, and reversed his conviction. *McMillian v. State*, 616 So. 2d 933 (Ala. Crim. App. 1993). All charges against him were then dismissed. Pet. App. 2a.

Soon after his release, Mr. McMillian filed a civil action under 42 U.S.C. § 1983, seeking damages for violations of his federal constitutional rights as well as various state law torts stemming from wrongful conduct in connection with his arrest, incarceration and the criminal investigation. Pet. App. 2a. Mr. McMillian sued Monroe County Sheriff Tom Tate, and Monroe County, in addition to other government officials. Pet. App. 2a. Mr. McMillian contends that the county is liable for Sheriff Tate's unconstitutional acts because the sheriff's edicts and acts may fairly be said to represent the official policy of Monroe County in the area of criminal investigations and law enforcement. Pet. App. 2a.

Among other things, Mr. McMillian has alleged that Sheriff Tate subjected him to racial slurs,[1] threats and

[1] Mr. McMillian is black and Sheriff Tate is white.

insults upon his arrest and while detained in the Monroe County Jail, Pet. App. 32a; that the sheriff conspired with others to punish, intimidate and threaten him by placing him on death row for over a year before his trial, Pet. App. 26a; that the sheriff withheld from prosecutors and his defense counsel exculpatory evidence demonstrating his innocence, Pet. App. 27a-28a; and that the sheriff manufactured inculpatory evidence by pressuring and coercing witnesses to give false testimony which resulted in his wrongful conviction. Pet. App. 28a-29a.

Mr. McMillian contends that all of the unconstitutional actions of Sheriff Tate were financed, funded and equipped by Monroe County, Pet. App. 12a, whose citizens elect the sheriff and empower him with final policymaking authority in the area of law enforcement. Pet. App. 11a-12a. Mr. McMillian additionally contends that the sheriff's unconstitutional actions are part of the county's unwritten policy and custom. The record in this case reflects that any judgment against Sheriff Tate is likely to be paid by Monroe County through its insurance policy with the Association of County Commissions of Alabama. Pet. App. 77a.

Motions to dismiss were filed by each of the individual defendants and were denied, in whole or in part, by the district court. Pet. App. 25a. However, the court granted Monroe County's motion to dismiss, relying entirely upon the Eleventh Circuit's subsequently vacated decision in *Swint v. City of Wadley*, 5 F.3d 1435, 1450-1451 (11th Cir. 1993), *vacated sub nom., Swint v. Chambers*

County Comm'n, 115 S. Ct. 1203 (1995). Pet. App. 53a-58a.[2] The district court then issued an order under 28 U.S.C. § 1292(b) certifying the county liability issue for interlocutory appeal. The Eleventh Circuit agreed to the certification. Pet. App. 3a.

On appeal the Eleventh Circuit did not dispute that a sheriff in Alabama is elected by the county, is financed and equipped by the county, and works only within the county. Pet. App. 11a-12a. Moreover, the court did not dispute that the sheriff has final policymaking authority for law enforcement functions. Pet. App. 9a. However, the Eleventh Circuit ruled that the "county," by which it presumably meant the county commission or the other parts of the county's government, could be distinguished from the sheriff. Pet. App. 10a. Although it recognized the absence of any clear authority for its position, Pet. App. 11a, the court held that because Alabama state law gives no one else in county government law enforcement authority other than the sheriff, the county cannot be liable for the sheriff's unconstitutional policy. Pet. App. 8a, 18a.

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[2] After the district court adjudicated the motions to dismiss, the court entertained motions for summary judgment by the defendants, granting them in part and denying them in part. Because some of the denials of summary judgment involved issues of qualified immunity, Sheriff Tate and some of the other defendants appealed pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In that separate appeal, the Eleventh Circuit affirmed the district court for the most part, leaving Sheriff Tate and several other defendants in the case. *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996).

Relying on the reasoning of *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993), subsequently vacated by this Court on jurisdictional grounds, *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995), the Eleventh Circuit concluded that "Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 8a. The court stated:

> The Supreme Court has not addressed whether a municipality must have power in an area to be held liable for an official's acts in that area. Still, we think that such a requirement inheres in the Court's municipal liability analysis. As Justice O'Connor explained in [*City of St. Louis v.*] *Praprotnik*, [485 U.S. 112, 123 (1988)], a municipal policymaker is the official with final responsibility "in any given area of a local government's business." 485 U.S. at 125.

Pet. App. 8a. The court further stated:

> Our holding here that Sheriff Tate is not a final policymaker for Monroe County in the area of law enforcement, because Monroe County has no law enforcement authority, really is just another way of saying that when Sheriff Tate engages in law enforcement he is not about the business of county government.

Pet. App. 18a.

In addition, the court of appeals suggested that, while not dispositive, the nominal reference to the sheriff as a member of the state executive department under one provision of Alabama law, and related immunities of the sheriff under state tort law, weigh against county liability for purposes of § 1983. Pet. App. 13a.

On December 6, 1996, this Court granted Mr. McMillian's timely petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court held that counties and municipalities are liable for the unconstitutional actions of local officials with final policymaking authority. *Id.* at 690. In *Pembaur v. Cincinnati*, 475 U.S. 469, 485 (1986), and in almost every circuit, it has been held that when a sheriff is elected, funded and equipped by the county, with jurisdiction limited to the county, the sheriff is the county's final policymaker in the area of law enforcement. In this case, the Eleventh Circuit properly held that an Alabama sheriff has final policymaking authority in the area of law enforcement. Pet. App. 9a. However, the court improperly held that because state law gives law enforcement authority to "sheriffs but not counties," Pet. App. 8a, the county is not liable for the sheriff's unconstitutional conduct. Pet. App. 18a.

The court below erred by expanding the requirements for county liability under § 1983. That is, the court required that a county official with final policymaking authority in an area share that authority with some additional county official before there can be county liability. This violated the Court's precedent in *Pembaur* and the dictates of *Monell* and its progeny. Because the county sheriff in Alabama *is* the local official with final policymaking authority in the area of law enforcement and because the sheriff's power is derived from his election

by the county's residents, his funding and financing from the county treasury, and his limited jurisdiction over the county only, the county is liable for the sheriff's unconstitutional policy and conduct under § 1983.

Even if the Eleventh Circuits's shared authority requirement for county liability were proper, other county officials in Alabama *are*, in fact, involved in the sheriff's administration of law enforcement. County commissions exercise discretionary authority over the funding of law enforcement operations and equipment purchases for law enforcement activities. County commissions also exercise authority over the staffing, rank and pay of law enforcement personnel. Moreover, Alabama law requires the county coroner and other county officials to occasionally carry out law enforcement duties. Consequently, the court below erred in concluding that when the sheriff engages in law enforcement "he is not about the business of county government." Pet. App. 18a.

Finally, the fact that county sheriffs have been nominally regarded as part of the state executive branch in no way diminishes their status as county officials with final policymaking authority in the area of law enforcement. Rather, Alabama law typically describes the sheriff as a county rather than a state official. Moreover, no matter how the sheriff is labeled in some instances, his or her functional status as the county's chief executive officer in the area of law enforcement establishes the county's liability for the sheriff's unconstitutional conduct.

ARGUMENT

I. WHEN A COUNTY ELECTS, EMPLOYS, FUNDS AND EQUIPS A COUNTY SHERIFF WHO HAS FINAL POLICYMAKING AUTHORITY IN THE AREA OF LAW ENFORCEMENT WITHIN BUT NOT OUTSIDE THE COUNTY, THE SHERIFF'S UNCONSTITUTIONAL OFFICIAL ACTIONS SUBJECT THE COUNTY TO LIABILITY UNDER 42 U.S.C. § 1983.

A. This Court Has Previously Approved the Relevant Factors for Determining Whether a Sheriff is the County's Final Policymaker.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court held that "the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* at 690. Although *Monell* clearly established that local governments may be sued under 42 U.S.C. § 1983 for a deprivation of rights protected by the Constitution, the Court rejected liability against municipalities based on a theory of *respondeat superior*. "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers *or by those whose edicts or acts may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694 (emphasis added).

In *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986), and in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988), the Court held that local officials who have "final policymaking authority" may by their actions subject the county or municipality to § 1983 liability. Relying on *Pembaur*, Justice O'Connor's plurality opinion in *Praprotnik* explained that whether an official has final policymaking authority depends on state law, *Praprotnik*, 485 U.S. at 123, and custom and usage. *Id.* at 127. Finally, in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), a majority of the Court affirmed the principles in *Pembaur* and *Praprotnik*, and held that a trial judge must "identify those officials or governmental bodies who speak with final policymaking authority" in evaluating whether a municipality or county is liable. *Jett*, 491 U.S. at 737.

In *Pembaur*, a majority of this Court held that a county sheriff in Ohio acted as a final policymaker for the county in the area of law enforcement. *Pembaur*, 475 U.S. at 476, 484-85. The Court affirmed the Sixth Circuit's conclusion that Ohio sheriffs are elected by the residents of each county, serve as the chief law enforcement officers in their counties, receive their offices, books, furniture, and other materials from their counties, and receive their salary and training expenses from their counties. *Pembaur v. Cincinnati*, 746 F.2d 337, 341 & n.3 (6th Cir. 1984). Consequently, the Court held that the county was liable for the unconstitutional conduct of the sheriff in the performance of law enforcement functions. *Pembaur*, 475 U.S. at 485.

Under Alabama law, as in Ohio, sheriffs are elected by the residents of their respective counties, are paid by

their counties, and receive their offices, books, furniture and other materials from their counties. Ala. Const. art. V, § 138 (1901); Ala. Code §§ 36-22-16, 36-22-18 (1975). Sheriffs in Alabama serve as the chief law enforcement officers in their counties inasmuch as their decisions are final and unreviewable and state law confers on them the duty to enforce the law "in their respective counties." Ala. Code § 36-22-3(4) (1975). Alabama sheriffs also receive their training expenses and other fees from their counties. *See* 187 Op. Att'y Gen. Ala. 23 (1982). Thus, there is nothing of relevance to distinguish the Alabama sheriff in this case from the Ohio sheriff in *Pembaur*. However, unlike the Court in *Pembaur*, the Eleventh Circuit failed to recognize that the Alabama sheriff is the final policymaker for his or her county in the area of law enforcement.

The Eleventh Circuit acknowledged that Alabama sheriffs are elected by the voters of their county, that the sheriffs' law enforcement operations are funded by their county commission from the county treasury, and that sheriffs exercise final law enforcement authority within their counties but not outside of them. Pet. App. 15a-16a & n.5. Despite these dispositive aspects of state law, the Eleventh Circuit nevertheless held that, for purposes of § 1983, an Alabama sheriff is not a final policymaker for the county. According to the Eleventh Circuit: "Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 8a. The court erred by presupposing, without any analysis, that the sheriff is distinct from county government and that the sheriff's power is not exercised on behalf of the county unless shared with other county officials.

B. The Court Below Improperly Expanded the Requirements for Establishing County Liability For a County Sheriff's Final Policymaking.

This Court has held that questions of policymaking authority are determined by looking to state law. *Praprotnik*, 485 U.S. at 123, 127. However, while the actual operation of local government is a question of state law, the question remains whether those state law principles add up to "final policymaker" status as a matter of federal law. In this case the Eleventh Circuit rejected commonly examined state law factors and, instead, imposed new federal requirements for holding a county liable under § 1983. The Eleventh Circuit improperly ruled that the "county," by which it presumably meant the county commission or the other parts of the county's government, could be distinguished from the county sheriff. Although it recognized the absence of any clear authority for its position, Pet. App. 11a, the court reasoned that because Alabama state law gives no one else in county government law enforcement authority other than the sheriff, the county cannot be liable for the sheriff's unconstitutional policy. Pet. App. 13a n.4.

Such reasoning abandons the functional analysis of county liability approved by this Court in *Pembaur*. In so holding, the court below misconstrued the holdings of this Court and the requirements for county liability under § 1983. Neither this Court nor the Sixth Circuit in *Pembaur* based its ruling on any express delegation of substantive law enforcement authority to Ohio counties independent of that to the sheriffs. It is not as if county governing boards in Ohio have independent law enforcement authority, or directly supervise the law enforcement

activities of their sheriffs, or ride around with the sheriffs in the patrol cars. In addition, unlike the Eleventh Circuit, other circuit courts have adopted the relevant state law factors this Court relied on in *Pembaur* in concluding that sheriffs are final policymakers for their respective counties.[3] Indeed, the court below conceded that its reasoning conflicted with other federal courts. Pet. App. 16a n.6.

The Alabama sheriff and his or her local law enforcement authority is not unique. In many states, the sheriff has sole authority over local law enforcement and is "the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected." *Turner v. Upton County, Texas,*

[3] Circuit courts have almost uniformly held that where a sheriff is funded by the county, is elected by the county and has jurisdiction only in the county, the sheriff is the final policymaker for the county. *See Davis v. Mason County*, 927 F.2d 1473, 1480-1481 (9th Cir.) (Washington county liable for sheriff who has final law enforcement authority), *cert. denied*, 502 U.S. 899 (1991); *Turner v. Upton County, Texas*, 915 F.2d 133, 136-37 (5th Cir. 1990) (Texas county liable for sheriff who completely controls county law enforcement and is accountable to county voters), *cert. denied*, 498 U.S. 1069 (1991); *Marchese v. Lucas*, 758 F.2d 181, 188-89 (6th Cir. 1985) (Michigan county liable for sheriff who is elected by county voters and is funded by county), *cert. denied sub nom. County of Wayne v. Marchese*, 480 U.S. 916 (1987); *see also Dotson v. Chester*, 937 F.2d 920, 925-32 (4th Cir. 1991) (Maryland county liable for sheriff even though under relevant state law sheriff is considered state officer for purposes of state tort liability). *But see Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 292-93 (7th Cir.) (no county liability where plaintiff "made no effort to show that the sheriff is a policy-making official of the county government"), *cert. denied*, 471 U.S. 1117 (1985).

915 F.2d 133, 136 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). As the Fifth Circuit has recognized, because a county official like a sheriff holds "virtually absolute sway over the particular tasks or areas entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein," his actions may be said to represent official policy for which the county may be liable. *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980); *see also Crowder v. Sinyard*, 884 F.2d 804, 828 (5th Cir. 1989) (county in Arkansas liable for sheriff's conduct even though sheriff is "solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers"), *cert. denied*, 496 U.S. 924 (1990).

The Eleventh Circuit's distinction between the county and the county's sheriff is meaningless for purposes of § 1983 liability. As the First Circuit has explained:

> What the County misunderstands is that it is not because county officials *other than the Sheriff* were "involved" in the promulgation of the strip search rule, that it is liable under *Monell*, nor is it because county officials failed properly to "oversee" the Sheriff. Rather, it is liable because the Sheriff was the county official who was elected by the County's voters to act for them and to exercise the powers created by state law. Accordingly, the Sheriff's strip search policy *was* Plymouth County's policy, and the County must respond in damages for any injuries inflicted pursuant to that policy.

Blackburn v. Snow, 771 F.2d 556, 571 (1st Cir. 1985).

Monell recognized that unconstitutional conduct by "lawmakers" as well as "by those whose edicts or acts may fairly be said to represent official policy" may give rise to county liability. *Monell*, 436 U.S. at 694; *see also Jett*, 491 U.S. at 737 (a judge may find municipal liability for "those officials *or* governmental bodies who speak with final policymaking authority"). By requiring that some county official other than the sheriff share law enforcement power before the sheriff can be deemed a county policymaker, the Eleventh Circuit's opinion below conflicts with *Pembaur* and with the proper understanding of § 1983 final policymaking doctrine. Because § 1983 is a remedy "to be broadly construed against all forms of official violation of federally protected rights," *Monell*, 436 U.S. at 700-701, the lower court's judgment should be reversed.

II. EVEN IF THE ELEVENTH CIRCUIT'S SHARED AUTHORITY APPROACH WERE PROPER, THE COURT BELOW ERRED IN CONCLUDING THAT AN ALABAMA SHERIFF'S LAW ENFORCEMENT ACTIVITIES FALL OUTSIDE THE LOCAL GOVERNMENT'S BUSINESS AND THAT THE SHERIFF IS THUS NOT THE FINAL POLICYMAKER FOR THE COUNTY.

According to the Eleventh Circuit, county liability for the sheriff's conduct exists only if he or she is "going about the local government's business." Pet. App. 8a (citing *Praprotnik*, 485 U.S. at 125). As explained previously in this brief, the Eleventh Circuit erred in presupposing that the sheriff operates distinctly from the county

and that other county officials must share law enforcement authority before the sheriff can be considered a county policymaker.

But even under the Eleventh Circuit's erroneous reasoning, it is clear that in Alabama, as in most states, other county officials are, in fact, actually involved in the law enforcement operation. Particularly in its funding through the county treasury, as well as in other ways, there is a shared authority between the sheriff and other county officials. This relationship with the rest of the county government and the county treasury, as well as his or her relationship with the voters, shows that the sheriff is "going about the [county's] business."

As noted above, in Alabama the county voters elect the sheriff. Ala. Const. art. V, § 138 (1901). The sheriff must pay to the county treasury all fees, monies and other funds collected by him or her. Ala. Code § 36-22-17 (1975). The county treasury pays the sheriff's salary as it does every other county official. Ala. Code. § 36-22-16(a) (1975). The county commission finances all law enforcement programs. Ala. Code § 36-22-18 (1975) ("The county commission shall also furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office."). In addition, when the sheriff cannot discharge his or her duties, the county coroner, another county official, must exercise the sheriff's law enforcement authority. Ala. Code § 11-5-5 (1975); *see also* Ala. Code § 15-4-9 (1975) (county coroner may

issue arrest warrants); Ala. Code § 15-4-4 (1975) (county coroner may serve subpoenas).

County officials, other than the sheriff, review contracts, take bids and make other discretionary judgments regarding law enforcement functions. *See Mobile Dodge, Inc. v. Mobile County*, 442 So. 2d 56 (Ala. 1983) (county commissioners and the county sheriff's department work together and the county is liable for business transactions undertaken to secure the sheriff's law enforcement needs). In addition, the county commission finances the county sheriff's law enforcement training, *see* 187 Op. Att'y Gen. Ala. 23 (1982) ("[T]he County may pay the expenses incidental to sending a police officer to a law enforcement academy, including salary."), and all other expenses relating to law enforcement activities. *See* Ala. Code § 36-22-19 (1975) (authorizing counties to pay county sheriffs' membership dues in Alabama Sheriffs Association).

The Eleventh Circuit has even recognized that the county government and the county sheriff act in a "partnership" with regard to the care and maintenance of jails and the treatment of pretrial detainees and, thus, in this context the county can be liable for the sheriff's conduct. *Parker v. Williams*, 862 F.2d 1471, 1478-79 (11th Cir. 1989). Contextualizing the work of the sheriff in this way, by distinguishing sheriffs' duties in and around the jail from the sheriffs' duties in law enforcement generally, is misguided. Law enforcement often requires the arrest and detention of criminal suspects until trial, yet under the Eleventh Circuit's rationale, the arrest, detention and safekeeping of those awaiting trial is not part of the

sheriff's law enforcement duties. This arbitrary distinction – between the specific law enforcement functions of jailing and managing pretrial detainees and the general "law enforcement area" – is highly unworkable, as is illustrated in this case. Many of the alleged violations of Mr. McMillian's rights relate to how he was housed and treated while a pretrial detainee. Moreover, there is a partnership between the county commission and the county sheriff in the law enforcement area because the commission is responsible for equipping the sheriff and funding all law enforcement activities and investigations. Under these circumstances the county sheriff's law enforcement work is necessarily a part of the local government's business.

Additionally, Alabama law does accord local government officials other than the sheriff some power in the administration of law enforcement. County commissions do not automatically acquiesce, without question, every time a sheriff makes a funding request for law enforcement operations. Rather, the commission exercises discretion over how to equip its sheriff department, and how much to fund law enforcement activities. The Alabama Supreme Court has held that local governments may establish budgetary appropriations regarding staffing, equipment, overtime pay to deputy sheriffs and other essential law enforcement functions. *See, e.g., Geneva County Comm'n v. Tice*, 578 So. 2d 1070, 1075 (Ala. 1991) (county may limit budget for law enforcement functions). Indeed, state law gives county commissions the authority to reject specific requests for law enforcement operations. *Ball v. Escambia County Comm'n*, 439 So. 2d 148 (Ala. 1983)

(commission may refuse to pay for some law enforcement operations even though sheriff makes specific request).

County commissions may also regulate and determine the classification and rank of deputy sheriffs. *See, e.g., Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n*, 632 So. 2d 442, 444 (Ala. 1993) (upholding the county commission's demotion of several sheriff deputies). In addition, the sheriff's personnel decisions are subject to review by the *County* Personnel Board. *See Fields v. State ex rel. Jones*, 534 So. 2d 615, 616-17 (Ala. Civ. App. 1987) (denial of deputy medical leave); *Etowah County Personnel Bd. v. McDowell*, 437 So. 2d 563, 563-64 (Ala. Civ. App. 1983) (termination of deputy sheriff for insubordination).

Moreover, the Alabama Attorney General's office has authorized counties to provide legal representation and insurance coverage to county sheriffs for the performance of law enforcement duties. 194 Op. Att'y Gen. Ala. 14 (1984). In fact, local governments in Alabama routinely provide legal representation to sheriffs when the sheriffs are sued for the performance of their law enforcement duties and similarly provide insurance coverage for county law enforcement conduct. *See First Mercury Syndicate v. Franklin County*, 623 So. 2d 1075, 1075 (Ala. 1993) (Franklin County purchased professional liability insurance for "its" sheriff department officers); *see also* Ala. Code § 11-1-9 (1975) (authorizing counties to defend lawsuits against county officials). Most significantly, in this case, the record indicates that Sheriff Tate's defense, and any judgment against the sheriff would be paid not by the state, but by an insurance fund paid for by the county through the Association of County Commissions of Alabama. Pet. App. 77a.

The Eleventh Circuit erred in concluding that when "Sheriff Tate engages in law enforcement he is not about the business of county government." Pet. App. 18a. Requiring more of a relationship between the county sheriff and other county officials than exists in Alabama subverts § 1983 and conflicts with this Court's precedent.

III. TO THE EXTENT THAT THE ELEVENTH CIRCUIT RELIED ON THE COUNTY SHERIFF'S NOMINAL DESIGNATION AS A "STATE OFFICER", THE COURT ERRED.

The Eleventh Circuit distinguished Alabama sheriffs from the Ohio sheriffs in *Pembaur* by referencing the Alabama Constitution which provides that the state executive department "shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county." Ala. Const. art. V, § 112 (1901). Based on this provision and an Alabama Supreme Court decision which relied on this provision, *see Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987), the Eleventh Circuit concluded that Alabama has designated the county sheriff to be a state official. The lower court appropriately recognized that this designation is not dispositive, but nonetheless held that it is "relevant to whether a sheriff exercises state or county power." *McMillian*, Pet. App. 13a. While it correctly refused to expressly conclude that Alabama sheriffs exercise state power and are therefore final policymakers for the state, the court erred by failing to recognize that sheriffs are county officials and therefore

exercise power in a manner that may subject counties to liability under § 1983.

As noted in prior sections of this brief, the sheriff in Alabama – like sheriffs in most states – is elected by the county's voters, is funded by the county treasury, exercises unreviewable authority within but not outside the county, and is involved with the county's business. In terms of the sheriff's functioning, he or she is clearly a county-based official who makes county law enforcement policy. Beyond that, the sheriff in Alabama, as in other states, is commonly understood to be a county official.

The word "sheriff" is generally considered to denote a county official. See *American Heritage Dictionary of the English Language* 1663 (3d ed. 1992) (defining "sheriff" as the "chief law enforcement officer . . . in a U.S. county"). Indeed, the word "sheriff" is derived from the Saxon word "scyre," meaning shire or county, and "reve," meaning keeper. Anderson, *A Treatise on the Law of Sheriffs, Coroners and Constables*, 5 (Dennis and Co, Inc., 1941). Treatises and books regarding law enforcement uniformly recognize the position of sheriff in the United States as a position with county authority:

> The principal county police position is that of sheriff, perhaps the oldest law-enforcement office in Anglo-American history. . . . The sheriff has broad powers covering the entire spectrum of criminal justice, including detection and apprehension of offenders, administration of county jails [and] execution of court orders. . . .

Kurian, *World Encyclopedia of Police Forces and Penal Systems*, 430 (Facts on File, 1989).[4]

Notwithstanding the fact that sheriffs are identified in Alabama's constitution under the state's executive system, they clearly set policy for their counties.[5] In addition, Alabama law does not specify that the sheriff sets law enforcement policy for the state as opposed to the county, or that the sheriff is not a final county policymaker in the area of law enforcement. In fact, Alabama law expresses the common understanding that the sheriff is a county-based official setting policy for the county. For example, the Alabama Code § 36-3-4 (1975) explicitly identifies county officers in Alabama as "[t]he sheriff, one coroner, members of county commissions, one county treasurer, when elective, and one constable for each election precinct. . . . " Alabama courts have similarly recognized that the sheriffs' law enforcement operations are

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[4] "The sheriff's department is one of the major components of county government. The sheriff is the principal police official within a county. . . . " John A. Humphrey and Michael E. Milakovich, *The Administration of Justice: Law Enforcement, Courts, and Corrections*, 102 (Human Science Press, 1981). "Throughout U.S. history, the sheriff has remained the principal law enforcement officer in the county." George T. Felkenes, *The Criminal Justice System: Its Functions and Personnel*, 53 (Prentice-Hall, 1973). "The most universal of all the county officers is the sheriff; he is found in every one of the 3,050 counties in the United States. . . . " Paul Wager, *County Government Across the Nation*, 15 (University of North Carolina Press, 1950).

[5] The language of Article V, § 112 of the Alabama Constitution is in itself ambiguous. By providing that the state executive branch shall include a sheriff "for each county," there is explicit recognition that the sheriff operates as a county officer.

part of the county's structure and that the sheriff is "chief executive officer of that department of county government." *Hale v. Randolph County Comm'n*, 423 So. 2d 893, 895 (Ala. Civ. App. 1982).

The designation of Alabama sheriffs as county officers is decades old. In *Jefferson County v. Dockerty*, 249 Ala. 196, 30 So. 2d 474 (Ala. 1947) (deputy sheriff entitled to receive reward money from county for making arrests), the Alabama Supreme Court recognized that "the sheriff of Jefferson County is undoubtedly a county officer. . . ." *Id.* at 477. In *In re County Officers*, 143 So. 345, 225 Ala. 359 (Ala. 1932), the court held that sheriffs are "strictly speaking, county officers" for purposes of a 1912 constitutional amendment regarding county officer's salaries. And in *State ex rel. Marin v. Pratt*, 68 So. 255, 257 (Ala. 1915), the court held that "a sheriff [is] the highest purely executive officer of a county." *Id.* at 257; *see also Barbour County Comm'n v. Employees of the Barbour County Sheriff's Dep't*, 566 So. 2d 493 (Ala. 1990) (members of Barbour County Sheriff's Department entitled to Barbour County employee retirement and insurance benefits).[6]

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[6] Alabama law additionally distinguishes sheriffs from local state officials in the judicial system:

> All full-time county personnel, including all persons for whom funding is provided by the unified judicial budget, serving the district and circuit courts, *other than sheriff's deputies and employees* and building maintenance and security personnel, shall become employees of the State of Alabama on October 1, 1977.

Ala. Code § 12-17-1 (1975) (emphasis added).

Similarly, Alabama law requires that every state election ballot must comply with the sample set forth by the legislature in Alabama Code § 17-8-5 (1975) ("The ballot herein provided shall be substantially in the following form[.]"). The Code's sample ballot identifies who is a county official by listing public officials in five distinct categories: state, congressional, presidential, legislative, and county. Sheriffs are again designated as county officials.[7]

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[7] In addition to affirmatively recognizing sheriffs as county officers, Alabama law omits sheriffs from those designated as state law enforcement officers. Alabama Code § 36-21-2(a) (1975) contains a comprehensive listing of all state law enforcement officers in Alabama, but it does not include county sheriffs:

> Any state law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Industrial Relations, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, Department of Agriculture and Industries, Alabama Department of Forensic Sciences, the Transportation Enforcement Division of the Alabama Public Service Commission, Alabama Liquefied Petroleum Gas Board or probation and parole officers of the Alabama Board of Pardons and Paroles, fire marshals of the Department of Insurance, revenue enforcement officers of the Department of Revenue, law enforcement officers of the State Capital Police, any investigator employed by a district attorney on a full-time basis, or correctional officers of the Department of Corrections shall receive a subsistence allowance. . . .

Alabama Code § 36-21-2(a) (1975).

The Alabama Department of Public Safety is the state's primary law enforcement authority. Members of the State Highway Patrol, under the authority of the Director of Public Safety, Ala. Code § 32-2-3(2) (1975), have the powers of peace officers in Alabama "and may exercise such powers *anywhere within the state.*" Ala. Code § 32-2-22 (1975) (emphasis added); *see also* Ala. Code § 9-2-86 (1975) (employees of the marine resources division of the Department of Conservation and Natural Resources have power to enforce laws with reference to seafood in any county of the State of Alabama); Ala. Code § 9-13-10 (1975) (employees of the state forestry commission may enforce laws anywhere in the state).[8] In addition, state law enforcement officers are paid from the state treasury and insured by the state government, in contrast to Sheriff Tate who is paid from the county treasury and insured by the county government.[9]

Moreover, the handful of Alabama cases that designate sheriffs to be "state officials" for the purposes of respondeat superior or for state law immunity purposes do not control the question of the county's liability under

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[8] In contrast, a county sheriff may only make arrests within the borders of the sheriff's county: "An arrest may be made, under a warrant or without a warrant, by any sheriff or other officer acting as sheriff or his deputy . . . *within the limits of the county.*" Ala. Code § 15-10-1 (1975) (emphasis added); *see also* Ala. Code § 36-22-3(4) (1975) ("It shall be the duty of the sheriffs *in their respective counties* . . . to secure evidence of crimes *in their counties*. . . . ") (emphasis added).

[9] In this case, any judgment against the sheriff is to come not from the state treasury but from an insurance fund set up by Alabama's counties. This further supports Sheriff Tate's status as a county official. Pet. App. 77a.

§ 1983.[10] *See Howlett v. Rose*, 496 U.S. 356, 376-78 (1990) (holding that Florida law which granted immunity to municipal entities did not preclude § 1983 claim against county school board); *Martinez v. California*, 444 U.S. 277, 284 (1980) (asserting that California statute which immunized parole decision-makers did not control § 1983 claim against public employees).

To the extent the Eleventh Circuit found state tort law immunities and the nominal identification of the sheriff as a member of the state's executive department relevant, Pet. App. 13a, the court was wrong. As Justice O'Connor observed in *Praprotnik*, "if . . . a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking to others, § 1983 could not serve its useful purposes." *Praprotnik*, 485 U.S. at 126. The Court has thus recognized that "[a]ny assessment of the applicability of a state law to federal civil rights litigation, therefore, must be made in light of the purpose and nature of the federal right." *Felder v.*

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[10] Similarly, any suggestion that the Eleventh Amendment bars county liability in this case would be misguided. Sheriff Tate has been sued in his official capacity as an officer of Monroe County, and the lower courts have treated his claims as such. Pet. App. 2a n.2; *see also id.* at 35a. Cities and counties do not enjoy Eleventh Amendment immunity even though they are created and controlled to some degree by the state. *Hess v. Port Authority Trans Hudson Corp.*, 115 S. Ct. 394, 404 (1994). Most significantly the record indicates that any judgment against the sheriff is likely to paid by the county through its insurance policy, not by the State of Alabama. The aim of the Eleventh Amendment is to protect the state and its treasury from liability. *See Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

Casey, 487 U.S. 131, 139 (1988). If states could insulate their counties from liability simply by designating sheriffs and others who operate on the local level as "state officials," § 1983 would certainly and easily be thwarted.[11] As the Fifth Circuit has recognized, even where state law identifies an elected official operating on the local level as a state official, county liability still exists because "county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements." *Crane v. Texas*, 766 F.2d 193, 195 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985).[12]

IV. RELEASING MONROE COUNTY AS A DEFENDANT ON A MOTION TO DISMISS WAS IMPROPER.

Alabama law demonstrates that the sheriff is a final policymaker for the county in the matters of law enforcement at issue in this case. However, even if state law were otherwise, Mr. McMillian would still be entitled to develop "custom and usage" facts to substantiate the

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[11] In Texas, Maryland, and Louisiana, elected county sheriffs are part of the state judicial branch. *See* Tex Const. art. V, § 23; Md. Const. art. IV, § 44; La. Const. art. V, § 27 (for "parish" sheriffs). Yet these law enforcement officials would not be able to claim judicial immunity for unconstitutional conduct during law enforcement investigations under § 1983.

[12] Alabama courts have granted "state official" status to a wide variety of public employees for whom municipal liability could not be avoided under § 1983. *See, e.g., Alexander v. State ex rel. Carver*, 150 So.2d 204, 208 (Ala. 1963) (city police chief is "state official" because state legislature created his office and directed him to enforce state laws as well as municipal laws).

allegation that the sheriff subjected him to county policies which violated his constitutional rights. This Court has held that "custom and usage" is relevant even where statutory law does not, by itself, demonstrate final policymaker status. *Jett*, 491 U.S. at 737. The court below failed to address this point despite the existence of circuit case law that recognizes that the "identification of the [final] policymaker may often involve *fact-sensitive inquiries*. . . ." *Mandel v. Doe*, 888 F.2d 783, 793 (11th Cir. 1989). Under these circumstances, the district court improperly granted Monroe County's motion to dismiss. *See Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984) (dismissal proper only where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations").[13]

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[13] For example, questions regarding the county's payment of any judgment against the sheriff could be relevant. *See Hess v. Port Authority*, 115 S. Ct. 394 (1994) (fact that judgment will not be paid from state treasury suggests that entity or person being sued is not alter ego of state for Eleventh Amendment immunity purposes).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 20, 1997

(10)

No. 96-542

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

WALTER MCMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT

In this action under 42 U.S.C. § 1983, petitioner seeks to hold respondent Monroe County liable for the allegedly unconstitutional actions of a sheriff. He claims that the sheriff is a final policymaker for the County even though, as the court below recognized, sheriffs are *state* officials under state law and counties neither control sheriffs nor are authorized to have *any* law enforcement policies. For the reasons that follow, the Court should reject this effort to transform section 1983 by making local governments vicariously liable for the actions of every autonomous but locally based official operating in their territories.

STATEMENT

Proceedings Below

In this action, petitioner Walter McMillian asserts federal and state claims against a variety of defendants alleged to have caused his false conviction for the 1986 murder of Ronda Morrison. Petitioner's 1988 conviction was overturned in 1993 by the Alabama Court of Criminal Appeals, based on a showing that substantial exculpatory and impeachment evidence had been withheld from petitioner and his counsel. *See McMillian v. State*, 616 So. 2d 933 (Ala. Crim. App. 1993). This civil action followed.

Petitioner's complaint alleges that his conviction was engineered by three people who were primarily responsible for investigating the murder: (1) Tom Tate, the Sheriff in Monroe County, (2) Larry Ikner, a state employee who works as an investigator with the District Attorney's office,[1] and (3) Simon Benson, another state employee who works as an investigator with the Alabama Bureau of Investigations.[2] They are alleged to have violated his constitutional rights by "causing his pretrial detention on death row, manufacturing inculpatory evidence, and suppressing exculpatory and impeachment evidence." Pet. App. 2a.

Petitioner brought claims under 42 U.S.C. § 1983 and state tort law against numerous defendants as individuals, including Sheriff Tate, Ikner and Benson. He added claims against Monroe County and against Tate and Ikner in their

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[1] Mr. Ikner works for the District Attorney for the 35th Judicial District, which covers Monroe and Conecuh Counties.

[2] In addition to the parties listed in the caption, these three individuals were parties to the same appeal in the court of appeals.

official capacity -- on the theory that the Sheriff is a county "policymaker" and that both Tate and Ikner acted pursuant to an "unwritten policy and custom, attributable to the defendant Monroe County." *Id.* at 51a-52a.

In 1994, the district court granted a motion to dismiss all of the claims against Monroe County and Tate and Ikner in their official capacity. In so doing, it "construe[d] the complaint as alleging federal and state claims against Defendants Tate and Ikner in their official capacities as officers of *Monroe County*, not as officers of the *State of Alabama*." *Id.* at 35a (emphasis in original). It therefore viewed the "claims directly against Monroe County based on alleged behavior by Defendants Tate and Ikner, as encapsulating the official capacity claims against Defendants Tate and Ikner," *id.* at 36a, and treated both sets of claims together.

In dismissing the § 1983 claims asserted directly or indirectly against the County, the district court relied on the Eleventh Circuit's ruling in *Swint v. Wadley*, 5 F.3d 1435 (11th Cir. 1993), which this Court later vacated on jurisdictional grounds in *Swint v. Chambers County Commission*, 115 S. Ct. 1203 (1995). Pet. App. 53a. In *Swint*, the court of appeals had ruled that a sheriff in Alabama could not be a final policymaker for a county in the area of law enforcement because, under Alabama law, counties have no law enforcement authority. That decision compelled dismissal of petitioner's claim that Sheriff Tate acted here as a policymaker for Monroe County. *Id.* at 54a. It also led the district court to rule that Tate and Ikner could not have acted "in accordance with an unlawful County policy," because, "[a]ccording to *Swint*, . . . an Alabama county can have no policy concerning law enforcement unless

it has the authority to make such policy." *Id.* at 55a.[3]

The district court certified this issue for immediate appeal pursuant to 28 U.S.C. § 1292(b) and the Eleventh Circuit granted permission to take an interlocutory appeal. *Id.* at 3a. Petitioner argued that the district court had erred in dismissing his claims against the County, relying on the theory that Sheriff Tate is a final policymaker for the County in the area of law enforcement. *Id.* at 2a.[4] The court of appeals affirmed.

Because the *Swint* case had been vacated, the Eleventh Circuit undertook a thorough review of the reasoning that underlay that prior ruling. It held, first, that before a given official can be a final county policymaker, he or she must have authority to set policy in an area where, under state law, the county has authority to set policy. "If the official's actions do not fall within an area of the local government's business, then the official's actions are not acts of the local government." *Id.* at 8a (citing cases from the Eleventh and other Circuits). Here, the court held, counties have no role in law enforcement.

It also rejected petitioner's argument that, under Alabama law, sheriffs do set law enforcement policy for a given county (rather than the State) because they are authorized to act only in that county. The court saw "no anomaly in having different state policymakers in different counties." *Id.* at 10a. It rejected the claim that the *Swint* rule is inconsistent with this

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[3] The court followed closely parallel reasoning in dismissing the *state*-law claims asserted against Monroe County and against Tate and Ikner in their official capacity. Pet. App. 72a-75a.

[4] On appeal, petitioner abandoned the claim that Monroe County could incur liability under section 1983 based on the actions of Larry Ikner, who was a state employee of a state official, the District Attorney.

Court's prior ruling in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Pet. App. 10a-14a. Finally, the court distinguished the Eleventh Circuit's own prior ruling in *Parker v. Williams*, 862 F.2d 1471, 1477-81 (11th Cir. 1989), where, based on its understanding that Alabama law gives counties responsibility for jail maintenance, the court had held that counties can be held liable under section 1983 for hiring decisions made by sheriffs when acting as jailers. The court of appeals noted that, in the area of law enforcement, there is no comparable "partnership" between Alabama counties and sheriffs. Pet. App. 14a-19a.[5]

SUMMARY OF ARGUMENT

Petitioner's basic argument is both straightforward and superficial. Because, he asserts, the Sheriff *looks* more like a county official than a state official, Monroe County should be held liable under section 1983 for the Sheriff's law enforcement activities. In so arguing, petitioner ignores the actual distribution of authority over law enforcement under Alabama

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[5] More recently, in No. 96-6333, *Turquitt v. Jefferson County*, the Eleventh Circuit has decided to review *en banc* the validity of the *Parker* panel's holding that counties in Alabama can be held liable under section 1983 for the actions of sheriffs acting as jailers. The *en banc* argument was recently rescheduled for next fall. The district court in *Turquitt* had followed *Parker* but stated the view that *Parker* is wrong based on Alabama law. *See Turquitt v. Jefferson County*, 929 F. Supp. 1451 (N.D. Ala. 1996). Rejecting the notion that counties have any role in the operation of jails, the court stated:

> The office of a sheriff in Alabama is a state constitutional office. The duties of the sheriff are prescribed by state statute. What authority does a county have to circumvent the state law or to interpose its own authority, which it can then delegate to the sheriff, when that authority has already been delegated to the sheriff by the State? . . . A county cannot delegate authority it never has.

Id. at 1454. *See also* Pet. App. 23a-24a (Propst, J., concurring specially below).

law and thus the real issue that must be addressed in order to determine if the Sheriff is a "policymaker" for the County as required by *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), and its progeny. An examination of Alabama law reveals that the Sheriff does not speak for the County in the area of law enforcement, because his authority over law enforcement does not emanate from the County Commission and cannot be withdrawn by the County Commission. In fact, the County, as such, is not authorized to play any role in law enforcement at all.

1. It is clear that the question presented in this case should be answered based on state law. *See Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988); Pet. App. 6a. Here, the Alabama Constitution expressly designates sheriffs as *state* executive officials. Ala. Const. art. V, § 112. All oversight of their operations is exercised by other state officials -- the Governor, the Attorney General, judges and district attorneys. County commissions have no authority over sheriffs' law enforcement activities. Nor are they authorized under state law to have *any* policies of their own in the field of law enforcement. The Eleventh Circuit was thus plainly correct when it held that the Sheriff was not exercising "county power," or creating county "policies," when he engaged in law enforcement activities.

2. Petitioner argues that an autonomous official, wholly independent from the County's governing body, can make policy for the County. This argument is fundamentally inconsistent with the analysis of section 1983 set forth in *Monell*.

a. The reason the *Monell* Court decided to treat municipalities as "persons" under the statute was their status as separate corporations. The Court concluded that, at the time of section 1983's passage, it was understood that corporations are

"persons" for most purposes. 436 U.S. at 687-89. But if that is the legal basis for allowing municipal liability, it makes no sense to hold counties liable for acts of sheriffs over whom they have no control. A "corporation," after all, does not typically (if ever) include officers or employees who have the power to bind the corporate entity but are immune from control by its governing board. Petitioner's approach -- that counties should be held strictly liable for all violations of federal law committed by any official who happens to operate exclusively within their geographic bounds -- finds no support in *Monell*.

b. Indeed, *Monell* specifically limits municipal liability to cases where the municipality *caused* the violation pursuant to an official policy. 436 U.S. at 692. This limitation was based both on the language of section 1983, *id.* at 691-92, and on Congress's rejection in 1871 of the Sherman amendment -- a proposal that would have held municipalities vicariously liable for the violent actions of their private citizens, *id.* at 693-94. This causation requirement plainly is not satisfied in this case.

To begin with, as the *Monell* Court noted, the one thing that Congress clearly did not intend was imposition of liability for law enforcement actions or inactions *on municipal entities not authorized to engage in law enforcement*. That is precisely what petitioners seek to impose in this case. More generally, *Monell* held that the causation requirement precludes actions against municipalities based on a *respondeat superior* theory. Here, however, petitioner's claim would fail even under a *respondeat superior* theory, since he does not claim that the County has control over the Sheriff. Thus, petitioner is asking the Court to impose a form of vicarious liability even broader than that *rejected* in *Monell*.

3. Petitioner offers no other cogent reason for treating the Sheriff as a policymaker for the County.

a. Petitioner's argument that this case is controlled by *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), is wholly unpersuasive. That case did not involve the question whether a sheriff is a county policymaker. While the Court noted, and did not take issue with, the *Sixth Circuit's* holding that a sheriff spoke for a county, it did not analyze the question itself. *Id.* at 484. In any event, *Pembaur* involved Ohio law, which is very different from Alabama law with respect to the role that counties play in law enforcement.

b. Petitioner's argument based on the fact that the County has insured itself against liability for the sheriff's conduct is circular and ultimately irrelevant. Under state law, the County is not liable for acts committed by the Sheriff in his official capacity. Until this Court resolves the issue presented here, however, a county still will face the *possibility* of a judgment based on a sheriff's action. The County's prudence in taking out an insurance policy to protect itself from such a judgment cannot be transformed into substantive evidence to support petitioner's case.

c. Petitioner has also failed to offer any common-sense explanation of why counties in Alabama should be liable for the actions of sheriffs. There is no danger that states will seek to insulate their municipalities from liability by transforming other municipal officials into state officials operating outside the control of municipal governing bodies. Nor would it be unfair to deny access to the County's "deep pocket." That is not a proper basis for expanding the scope of section 1983. In *most* section 1983 actions, the only available defendant is the individual official, sued in his individual capacity. That is what Congress intended in every case except those where municipalities directly cause violations of federal law. That did not occur here.

ARGUMENT

Petitioner's argument for attributing the conduct and policies of Sheriff Tate to Monroe County is based primarily on the fact that, on the surface, he "looks" like a county official. But superficial appearances alone cannot justify imposing on Monroe County liability for every unconstitutional policy that the Sheriff may choose to adopt. Alabama law provides that sheriffs, although they are elected and operate in specified counties, are state officials who report to other state officials for many of their functions and are not answerable *in any way* to county commissions. On such facts, this Court's seminal ruling in *Monell*, far from supporting municipal liability, precludes it.

In holding that Congress intended to include municipalities within the category of "persons" who may be sued under section 1983, the *Monell* Court relied on the fact that municipalities are corporations distinct from the rest of the state governmental structure. It went on to make clear that municipalities may be held liable only for their own illegal *policies* -- not on the basis of *respondeat superior*. Here, counties, as corporations governed by county commissions, have no law enforcement role in general and no role in overseeing sheriffs in particular. Thus, counties in Alabama cannot, under state law, have *any* policy -- unconstitutional or otherwise -- with regard to law enforcement. Treating the Sheriff as a final policymaker for the County in the area of law enforcement would ignore the "corporation" rationale that underlies municipal liability and expose counties to a form of vicarious liability even more extreme than *respondeat superior* -- liability for the misconduct of an official they cannot control.

I. UNDER CONTROLLING PRINCIPLES OF ALABAMA LAW, SHERIFFS ARE STATE OFFICIALS WHOSE ACTIONS CANNOT FORM THE BASIS OF COUNTY LIABILITY.

Section 1983 provides a remedy for violations of federal law committed, under color of state law, by "persons." That statute does not, however, guarantee that a public entity will be available as a potential defendant whenever a public official commits a violation of federal law. In most cases, including all cases involving misconduct by state officials and most cases involving misconduct by local officials, the only potential defendants are the officials themselves, sued in their individual capacity.

In *Monell*, this Court held that cities and counties are also "persons" within the meaning of section 1983, and thus may be held liable for *their* violations of the Constitution or federal law -- *i.e.*, for violations that occur pursuant to an official municipal policy or custom. Such a policy or custom, the Court added, may be created by the municipality's legislators or "by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694.

This Court has subsequently held that the determination whether a municipality may be held liable for the actions of a given official turns on *state* law. *See Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123; Pet. App. 6a.[6] "As with

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[6] *Jett* and *Praprotnick* shed little light on the question presented here because they dealt with government employees who were concededly employed by municipalities but were said to lack the authority required to set municipal policy. Petitioner attempts to find support for his position in *Pembaur*, a case involving an Ohio sheriff. As we show *infra*, however, the sole issue decided by the Court was whether a single act by an official found below to have municipal policymaking authority could constitute an actionable municipal policy. *See* pp. 32-35 *infra*.

other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett*, 491 U.S. at 737. Using relevant legal materials, it is up to the judge to identify those officials who "speak with final policymaking authority for the local governmental actor" whom the plaintiff seeks to hold liable. *Id.*

Here, state law gives an explicit and unambiguous answer: sheriffs are state officials who cannot, through their actions, create a basis for county liability either under state tort law or under section 1983. Although sheriffs are elected locally, work only in a given county, and receive their funding through the county's government, they do not set policy for the county in the area of law enforcement, because Alabama counties have no authority to become in any way involved in law enforcement.[7]

Alabama, like other states, has both a state government and county governments. Ala. Code § 11-1-1. Unlike in some states, however, Alabama counties do not have "home rule" powers; they are limited to performing the relatively narrow

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[7] Because of the clarity of state law, it is specious for petitioner to claim that he was improperly denied an opportunity to "develop 'custom and usage' facts to substantiate the allegation that the sheriff subjected him to county policies which violated his constitutional rights." Pet. Br. 26-27. Petitioner does not and cannot explain what facts he might "develop" that could be relevant. Certainly there is no suggestion in this case that the Sheriff's actions toward petitioner were caused by directives received from the county commission or some other representative of the County. He either acted autonomously or in concert with other *state* officials working on the case.

functions expressly delegated to them by state law. These functions primarily involve construction and maintenance of the county road system and two buildings -- a county courthouse and a county jail. *See id.* §§ 11-3-10, 11-3-11, 11-14-10. There is no statute authorizing counties to engage in law enforcement and they do not, in practice, play any role in passing or enforcing criminal laws.

Alabama counties are governed by county commissions elected by the voters. The commissions exercise limited legislative powers in the areas of responsibility assigned to counties, and individual commissioners also exercise executive powers in those same areas. This Court has recognized that the "principal function" of county commissions in Alabama "is to supervise and control the maintenance, repair, and construction of county roads." *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 824 (1992) (citing Ala. Code §§ 11-3-1, -10).

Rather than granting law enforcement authority to county government, Alabama reposes this power in the office of sheriff. A sheriff is elected in each county of the State by the voters of that county. Ala. Const. art. V, § 138. Under the Alabama Constitution of 1901, sheriffs are specifically designated as *state* officials who are part of the state executive branch. *Id.* § 112 ("The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, *and a sheriff for each county*.") (emphasis added).[8] As a result, they share the same "sovereign" immunity accorded under Alabama law to

[8] Although a sheriff is the only one listed in section 112, there are in fact numerous state officials elected at the local level in Alabama. These include circuit judges and district attorneys (elected to operate in one of the 40 judicial circuits) and state district judges (elected to operate in one of the 67 counties).

other state officials. *Ex Parte Purvis*, 1996 Ala. LEXIS 736 (Ala. Dec. 6, 1996); *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987).[9] Moreover, it is well settled that, under state law, Alabama *counties* cannot be held liable for the tortious acts of sheriffs based on a theory of *respondeat superior* because sheriffs are not treated as county officials. *King v. Colbert County*, 620 So. 2d 623, 625 (Ala. 1993); *Parker v. Amerson*, 519 So. 2d at 442.[10]

Sheriffs in Alabama, to a significant extent, work for other *state* officials. They have three basic functions: (1) assisting the state judicial system by serving process and performing other related tasks, Ala. Code § 36-22-3(1), (2) operating the jail, *id.* § 14-6-1, and (3) enforcing state law in their county, *id.* § 36-22-3(4). With respect to judicial functions, sheriffs take orders from, and are supervised by, *state*

[9] The Alabama Supreme Court noted in *Parker* that state "appellate opinions sometimes have referred to sheriffs as county officers or as the chief executive officers of counties." 519 So.2d at 444 (citing cases); *see* Pet. Br. 22 (citing the same cases). The court stated, however:

> In none of these cases was Article V, § 112, Constitution of 1901, discussed. *The clear intention of the framers of the Constitution overrides these decisions*, none of which held that sheriffs were county officers for the purpose of imposing vicarious liability on a county for the acts of a sheriff.

519 So. 2d at 444 *(emphasis added)*.

[10] The Alabama courts have also rejected efforts to hold sheriff's *departments* liable for the state-law torts of sheriffs, reasoning that a sheriff's department is not a legal entity. *See King v. Colbert County*, 620 So. 2d at 626; *White v. Birchfield*, 582 So. 2d 1085 (Ala. 1991).

judges.[11] With respect to jail operations, they receive general supervision from the Alabama Board of Corrections. *See id.* §§ 14-6-84, -85, -86, -90, -98. In the area of law enforcement, sheriffs are not supervised on a day-to-day basis, but they can be directed to perform criminal investigations and make reports about those investigations by the Governor, the State Attorney General, or the district attorney. *Id.* § 36-22-5.[12] Moreover, the Governor is specifically authorized by the state constitution to require sheriffs to provide "information in writing, under oath," concerning the conduct of their duties. Ala. Const. art. V, § 121.[13] If a sheriff position becomes vacant, it is filled through an appointment by the Governor. Ala. Code § 36-9-17.

Indeed, the history of the office of sheriff in Alabama demonstrates the State's desire to centralize control over sheriffs in the *state* government. The 1901 Constitution specified that sheriffs may be removed from office for misconduct only through an original impeachment action in the Alabama Supreme Court, generally initiated by the State Attorney General at the request of the Governor. Ala. Const. art. VII, § 174. This was a change from the former system,

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[11] The primary trial court in the Alabama judicial system is the circuit court. There are forty judicial circuits, some of which are limited to one county while others encompass multiple counties. The presiding judge of each circuit exercises "general supervision" over the sheriff or sheriffs in the circuit. Ala. Code § 12-17-24. Other judges may also direct the activities of sheriffs with respect to particular matters. *Id.* § 36-22-3(2).

[12] District attorneys, as we have noted, are state officials elected to perform prosecutorial functions for a given judicial circuit. Ala. Code § 12-17-180.

[13] The minimum qualifications and training requirements for sheriffs are all specified in a state statute, with a state agency determining which training programs are adequate. Ala. Code § 36-21-46. County commissions, by contrast, have no role in establishing such qualifications.

under which sheriffs were impeached at the local level. Ala. Const. art. VII, § 3 (1875).[14] The change was made in order to tighten central control over sheriffs, in response to the perception that "the neglect of sheriffs" had led to an "excessive number of lynching cases in Alabama." *Parker v. Amerson*, 519 So. 2d at 443. At that time, "the failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism . . . led [the Governor] to believe that sheriffs must be held accountable to a higher and more central authority, the Supreme Court, and that this accountability would operate to guarantee the political rights of prisoners." *Id.* at 443-44; *see also id.* at 444 ("Sheriffs were made more accountable to the supreme executive power of the state, the Governor."). The 1901 Constitution also specified that it was an impeachable offense for a sheriff to make a false report to the Governor or to allow a prisoner in the county jail to be removed and killed or injured. Ala. Const. art. V, §§ 121, 138.

Thus, while the Governor and other state officials may not be intimately involved with an individual sheriff's law enforcement activities, they do have ample authority to act when a sheriff's law enforcement power is being abused. Here, for example, if it were true that Sheriff Tate had adopted a policy of fabricating inculpatory evidence and suppressing exculpatory evidence, the remedy provided by state law would be action by the Governor followed, if necessary, by impeachment proceedings before the Supreme Court.

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[14] A very similar provision, authorizing removal by what were then known as "county courts" of various specified "county officers" and city officials, but *excluding* sheriffs, was retained in the 1901 Constitution. Ala. Const. art. VII, § 175.

As for county commissions, Alabama law gives them *no* role in passing the criminal laws enforced by sheriffs, developing policies governing local law enforcement, or supervising sheriffs in the performance of their law enforcement duties. *See* Pet. App. 7a-8a; *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984) (county commission not authorized to regulate sheriff's personnel decisions regarding deputies). Nor can county commissions remove sheriffs from office or discipline them in any way.

Counties do appropriate the funds for sheriffs' operations. But this aspect of state law, properly understood, only serves to reinforce the conclusion that the county commissions lack any power in the area of law enforcement. Under Alabama law, the duty of the county to provide funds and facilities to be used by sheriffs is largely non-discretionary. *See* Ala. Code § 11-14-10 (duty to maintain a jail); *id.* § 36-22-16 (duty to pay a specified salary to sheriff); *id.* § 36-22-18 (duty to furnish sheriff with necessary quarters, supplies, and automobiles). If a county appropriates an unreasonably small amount of money for these purposes, a sheriff can sue the commission in state court for relief. *See Geneva County Comm'n v. Tice*, 578 So. 2d 1070 (Ala. 1991); *Etowah County Comm'n v. Hayes*, 569 So. 2d 397 (Ala. 1990).

In sum, the county government is a conduit for the transfer of locally raised funds to the sheriff.[15] But the "power

[15] *Amici* ACLU and the Lawyers' Committee argue that a "sheriff's hiring and personnel decisions are subject to review by the *County* Personnel Board." Br. at 9 (citing cases). They neglect to note a more recent case holding that neither a sheriff nor his deputies is covered by a county personnel system because a "sheriff is not a county employee; rather, he is a member of the executive branch of state government and thus a state employee by virtue of the Constitution of the State of Alabama." *Whitten v. Lowe*, 677 So. 2d 778, 779 (Ala. Civ. App. 1995).

of the purse," in this instance, does not provide the legislative body with leverage to control the officer spending the money.[16] The State's decision to mandate local funding of sheriffs thus cannot be construed as an indirect grant to counties of a role in the law enforcement activities of sheriffs. *See Soderbeck v. Burnett County*, 821 F.2d 446, 451-52 (7th Cir. 1987) (Wisconsin sheriff is not a county policymaker, although locally elected and funded through county).[17]

The Eleventh Circuit thus had a sound basis for concluding in this case, as it had in *Swint*, that under state law any law enforcement policy adopted by a sheriff could not be attributed to the county for purposes of liability under section 1983. Sheriffs in Alabama do have a substantial degree of policymaking authority in the area of law enforcement. But, as the court of appeals recognized, this authority did not come from the county commissions and could not be retracted by those commissions.

As Justice O'Connor observed in her plurality opinion in *Praprotnik*, the "States have extremely wide latitude in determining the form that local government takes," and this has predictably produced "a rich variety of ways in which the *power of government* is distributed among a host of different officials

[16] Although state law authorizes a county commission to audit the expenditure of funds it has appropriated, Ala. Code § 11-3-11(a)(4), there is no basis for concluding that this authority could properly be used to question a sheriff's substantive policies and spending priorities.

[17] If funding were enough, then a number of state officials in Alabama would be transformed into county officials. Counties routinely pay part of the salary of officials such as District Attorneys and District Judges. Ala. Code §§ 12-17-68, -220.

and official bodies." 485 U.S. at 124-25 (emphasis added).[18] Given this reality, "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id.* at 126. Nor should it second-guess state-law limitations on municipal policymaking, by holding a county liable for "policies" adopted by an autonomous state official with respect to matters that are wholly outside the authorized scope of county activity.

II. PETITIONER'S PRIMARY ARGUMENT FOR TREATING AN ALABAMA SHERIFF AS A COUNTY POLICYMAKER IS NOT ONLY UNPERSUASIVE BUT FUNDAMENTALLY INCONSISTENT WITH THIS COURT'S RULING IN *MONELL*.

Petitioner responds to the ruling below, not by disputing the Eleventh Circuit's analysis of state law, but by reframing the question. He suggests that the power of the Monroe County Commission in the area of law enforcement is

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[18] Petitioner is not correct in claiming that the circuits "have almost uniformly held that where a sheriff is funded by the county, is elected by the county and has jurisdiction only in the county, the sheriff is the final policymaker for the county." Pet. Br. 12 n. 3. *See Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (county cannot be sued for misfeasance in jail run by sheriff who answers only to the electorate and not to the county board); *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989) ("Where, as here, controlling law places limits on the County's authority over the district attorney, the County cannot be said to be responsible for the conduct at issue."); *Soderbeck v. Burnett County*, 821 F.2d at 451-52 (where state law designates sheriff as a state official, and he is independent of county control in the area of law enforcement, sheriff is not a county policymaker for purposes of section 1983). The differing outcomes among the circuits reflect, more than anything else, the wide variety of governmental arrangements among the states.

irrelevant, because the Sheriff himself is properly viewed as an autonomous local official who sets law enforcement policy for "the County." He bases this conclusion on the fact that the Sheriff has some of the characteristics commonly associated with local officials -- *i.e.*, (1) local election, (2) a local area of operations, and (3) funding through the county budget process. In other words, petitioner's argument is that the Sheriff "looks like" a county official and therefore must be a county policymaker.[19]

Entirely missing from this argument is any suggestion about why it makes *sense* to interpret section 1983 as authorizing municipal liability for the acts of an official who is locally based but acts entirely outside the control of the municipal governing body.[20] This omission is particularly striking in light of the reasoning that led this Court, in *Monell*,

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[19] Petitioner goes so far as to quote general treatises on law enforcement, and to analyze the etymology of the word "sheriff," Pet. Br. 20-21 -- as if either of these sources could establish what governmental structure currently exists in Alabama. For what it may be worth, his linguistic analysis is incomplete. "Sheriff" is a combination of the Old English words for "shire" and "reeve." Webster's Third New Int'l Dictionary 2094 (1986). A "reeve," in turn, was a "local administrative agent of the king in Anglo-Saxon times." *Id.* at 1907. Thus, a "sheriff" in Britain usually administered a county or shire "by royal appointment," *id.* at 2094, and was not a "local" official in the usual sense.

[20] The rule sought by petitioner certainly cannot be justified on the basis of the usual policies underlying tort law. If an autonomous Alabama sheriff commits a violation of the Constitution, the County cannot be said to merit punishment for this misdeed. Nor, obviously, would extending liability to the municipal body in such a case serve the cause of deterrence. *Cf. Monell*, 436 U.S. at 693-94 (rejecting argument that *respondeat superior* rule should apply under section 1983 because "accidents might . . . be reduced if employers had to bear the cost of accidents"). Finally, this Court has expressly rejected the argument that section 1983 should be applied to municipalities expansively so that "the cost of accidents [can] be spread to the community as a whole." *Id.*

to recognize municipal liability under section 1983. That reasoning *precludes* application of a test like the one implicitly proposed by petitioner -- a test that ignores the actual allocation of power under state law and turns on whether a given actor has the superficial appearance of a local official.

A. Petitioner's Argument Cannot Be Squared with the Primary Factor that Led this Court to Recognize Municipal Liability in Monell -- the Status of Municipalities as Separate "Corporations" Under State Law.

The first aspect of *Monell* that is relevant here is the basis on which this Court decided to treat municipalities as "persons" within the meaning of section 1983 -- the fact that they are organized as "corporations" under state law.[21] The conception of municipalities as corporations properly responsible as separate entities for their own corporate acts is strongly in tension with the proposition that Congress intended to hold municipalities liable for the acts of locally based officials acting entirely outside the control (and areas of responsibility) of the municipal governing board.

The *Monell* Court determined, based on the Dictionary

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[21] Much of the *Monell* decision was devoted to explaining why the Court was wrong in *Monroe v. Pape*, 365 U.S. 167 (1961), when it held that the legislative history of the Civil Rights Act of 1871 (more specifically Congress's rejection of the "Sherman amendment") precluded an interpretation of the statute as covering municipalities. The only affirmative support for municipal liability identified by the *Monell* Court in the legislative history came in (1) various statements anticipating a broad interpretation of the statute, and (2) statements by Representative Bingham anticipating that takings claims would be actionable under the statute. 436 U.S. at 683-87.

Act and various court decisions, that by 1871 corporations (including "municipal corporations") were generally treated as "persons" for purposes of statutory analysis. 436 U.S. at 687-89. In the Dictionary Act, passed just months before the Civil Rights Act of 1871, Congress had provided that "'in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.'" *Id.* at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). The Court thus concluded that "the 'plain meaning' of [section 1983] is that local government bodies were to be included within the ambit of the persons who could be sued." *Id.* at 689.[22]

This view of municipalities as separate public corporations is a consistent theme throughout the *Monell* opinion and throughout the legislative record analyzed in that opinion.[23] It was what led the Court to equate municipalities with the other "persons" who could be sued under section

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[22] Shortly thereafter, Congress amended the Dictionary Act to delete the reference to "bodies politic" while continuing to define "person" as including "corporations." It did so on the theory that the term "bodies politic" either was redundant or, if broader than the term "corporation" because it included governmental structures not formally incorporated, went too far. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 190-91 (1990). This clarification further rebuts the notion that Congress conceived of the municipalities liable under section 1983 as nebulous collections of locally based officers, rather than as corporate structures ultimately governed by county boards.

[23] *See, e.g.*, 436 U.S. at 668 (opponents of Sherman amendment thought Congress could not "obligate ***municipal corporations*** to keep the peace if those corporations were neither so obligated nor so authorized by their state charters") (emphasis added); *id.* at 669 (constitutional objections to Sherman amendment "would not have prohibited congressional creation of a civil remedy against state ***municipal corporations*** that infringed federal rights") (emphasis added).

1983 -- *i.e.*, individual public officials in their individual capacities. *See, e.g.*, 436 U.S. at 685-86 ("[S]ince municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [section 1983] . . . there is no reason to suppose that municipal corporations would have been excluded from the sweep of [section 1983].").[24]

Eleven years later, the Court drew the same line when it came time to decide whether the states themselves are "persons" within the meaning of section 1983. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), the Court again discussed the definition of "person" in the Dictionary Act -- a definition that included "bodies politic and corporate" -- concluding that this phrase "was used to mean *corporations, both private and public (municipal)*, and not to include the States," *id.* at 69 (emphasis added). The Court in *Will* thus left *Monell* undisturbed, while holding that Congress did not intend to authorize suits against "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." *Id.* at 70.

In recognizing this distinction, the Court was not drawing on a clean slate. The "perception of local political subdivisions as mere chartered corporations remained largely unchanged during the nineteenth century." Melvyn R. Durschlag, *Should Political Subdivisions Be Accorded Eleventh*

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[24] *See also* 436 U.S. at 682 (1871 Congress saw "no distinction of constitutional magnitude between officers and agents -- including corporate agents -- of the State"); *id.* 707-08 (Powell, J., concurring) ("Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right . . . . Today the Court recognizes that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.").

Amendment Immunity?, 43 DePaul L. Rev. 577, 590 (1994). Moreover, the common law has long differentiated between municipal corporations and other governmental entities created by the state by allowing only the former to be sued for the torts of their agents. *See, e.g.*, 2 J. Dillon, *Municipal Corporations* § 966 (4th ed. 1890) ("As respects *municipal corporations proper*, whether specially chartered or voluntarily organiz[ed] . . ., it is, we think, universally considered . . . that *they are liable for acts of misfeasance* . . . done by their authorized agents or officers . . . .") (emphasis in original).[25]

But accepting petitioner's argument -- that Monroe County is liable for policies created by the incumbent in an office that it did not create and cannot control -- would require the Court to abandon this conception of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is almost incoherent to suggest that a single corporation can include both a governing board and a separate official vested with unchecked authority to set corporate policy. That reality is reflected in the way that the *Monell* Court referred interchangeably to suits against "municipalities," 436 U.S. at 690, suits against "[l]ocal governing bodies," *id.*, and suits against a local "government as an entity," *id.* at 694.

Indeed, the precise issue raised here by petitioner -- whether a county as a municipal corporation can encompass both a governing board and an autonomous sheriff -- was

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[25] Indeed, the traditional rule was that incorporated cities could be sued but counties could not, precisely because the latter were not formally chartered as corporations and thus were viewed as "political divisions of the State created for convenience." 2 Dillon, *supra*, § 963; *see* 18 McQuillan, *Municipal Corporations* § 53.05 (3d ed. 1993).

anticipated by one of the congressmen whose statements in the 1871 debates were partially quoted in *Monell* (*see id.* at 680), Representative Burchard. As he put the matter:

> *Police powers are not conferred upon counties as corporations.* . . . The county commissioners . . . have [the] power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. *These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county.* . . . But still in few, if any, States is there a statute conferring this power upon the counties.

Cong. Globe 795 (April 19, 1871) (emphasis added). Representative Burchard then went on to express his opposition to the "Sherman amendment" -- a proposal that would have held counties liable for failure to enforce the law within their borders -- asserting that it was an "attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance." *Id.* Thus, at least to him, it was clear that the existence of a sheriff in a county did not mean that the county as a corporation had any role in, or responsibility for, law enforcement -- or that it was constitutional to pretend otherwise by imposing liability on counties when sheriffs failed to keep the peace.

In essence, what petitioner asks the Court to adopt is a radically different conception of "Monroe County" as a unit of *geography*, where "county" policy can be set both by the county commission (including those officials to whom the commission delegates authority) *and* by any other officials authorized by

state law to operate in that geographic area.[26] But *Monell* did not authorize suits against units of geography; nor did it authorize suits against local governments for deprivations of federal rights committed by *state* officials operating within local borders. The only basis for treating municipalities as "persons" under section 1983 was the *Monell* Court's understanding of cities and counties as corporate entities with a separate, coherent and cohesive structure and a single governing body. It would make no sense to abandon that understanding and thereby expand municipal liability beyond anything that Congress could have had in mind. *See* 436 U.S. at 694 ("[I]t is when execution of a *government's* policy or custom . . . inflicts the injury that the *government* as an entity is responsible under § 1983.") (emphasis added).

Petitioner and his *amici* make much of the statement in *Monell* that a local government's policy may be set either "'by its lawmakers *or by those whose edicts or acts may fairly be said to represent official policy*.'" 436 U.S. at 694 (emphasis added); *see* Pet. Br. 8, 14; U.S. Br. at 13 n. 4; Br. of the ACLU and Lawyers Committee at 15, 19-20. But this language hardly suggests that the Court anticipated municipal policies created by acts of officials who are entirely outside the control of the municipal "lawmakers." This language in *Monell* refers to the familiar situation where an executive official, exercising powers *delegated* by municipal lawmakers and thus subject to their

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[26] It is commonplace for state officials, such as sheriffs, prosecutors and judges, to have functions that "concern the whole state or its people generally, although territorially restricted." 2 McQuillan, *supra*, § 4.115, at 245-46. Traditional local government law treats these as officers distinct from municipal officers, whose "powers and duties relate exclusively to matters of purely local concern." *Id. See also Calvert v. Cullman County*, 669 So. 2d 119, 121 (Ala. 1995) (difference between "county" and "county commission" as potential defendants is merely one of "nomenclature" with no legal consequence).

ultimate control, sets policy in a given area. In that situation, the policy is properly attributed to the municipality. But *Monell* points just the other way in cases where executive officials derive their power directly from the state and are immune from municipal control.[27]

To escape this logic, the United States attempts to introduce the concept of "separation of powers" into the discussion. U.S. Br. at 13 n.4. But that concept has little utility here. Unlike the federal government (and to a great extent states as well), municipalities do not possess all of the attributes of sovereignty; they are creatures of the states with only those powers specifically conferred on them. Thus, the fact that a county commission may lack law enforcement power does not, as the United States seem to presume, indicate that the "county's" law enforcement power is being exercised elsewhere, by another "branch" of the municipal government. Often, as in Alabama, it means the county has no role in that arena.

For these reasons, a federal court should require the clearest indications in state law before concluding that an entirely autonomous executive official is a part of and a policymaker for such a corporation. The Eleventh Circuit was therefore correct in holding that sheriffs in Alabama are *not* part of the county government.

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[27] Here, for example, petitioner alleged that Monroe County has a "policy and custom . . . of withholding exculpatory evidence in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony, and of instigating unwarranted and malicious criminal prosecutions." Pet. App. 51a-52a (quoting First Amended Compl. ¶ 53). It would be rather remarkable if state law gave a sheriff the unilateral authority to adopt such policies for a county while denying the county commission any power to alter those policies.

B. Petitioner's Argument is Also Inconsistent With the Causation Requirement Recognized in Monell.

The tension between petitioner's position and *Monell* is even clearer in light of the Court's second holding -- that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal *policy* of some nature *caused* a constitutional tort." 436 U.S. at 691 (emphasis added). *See also id.* at 694 (allowing municipal liability since the case "unquestionably involve[d] official policy as the *moving force* of the constitutional violation") (emphasis added). In every legal and practical sense, it is absurd to suggest that Monroe County as a municipal corporation (or the Monroe County Commission as its governing body) adopted or ratified a law enforcement policy that caused the alleged violations of petitioner's constitutional rights.

1. *Origins of the Causation Requirement*

The causation requirement in *Monell* was derived, in part, from the language of section 1983, which creates a right of action against "any person who . . . shall subject or cause to be subjected" any other person to a deprivation of federal rights. As the Court recognized, this "language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights," but it also "suggests that Congress did not intend § 1983 liability to attach where such causation was absent." 436 U.S. at 692. *See also Pembaur*, 475 U.S. at 478 ("*Monell* is a case about responsibility.")

Even more important to the Court's conclusion was "the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its

constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Id.* at 479 (emphasis in original). This insight was derived from rejection in the House of Representatives of the "Sherman amendment," a proposed addition to the same act that contained section 1983, which, as noted above, would have imposed liability on municipalities whenever private citizens within their borders "'riotously and tumultuously assembled . . . with intent to deprive'" another person of a federal right. *See Monell*, 436 U.S. at 666 (quoting the first conference version of the amendment). *See also Jett*, 491 U.S. at 726-27.

As the *Monell* Court exhaustively demonstrated, this proposal was defeated on the ground that many of "the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local governments to create police forces," either directly or through imposition of liability for damages. 436 U.S. at 673. Numerous members of the House asserted in the debates that "[c]ounties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them." Cong. Globe 794 (April 19, 1871) (Rep. Poland). *See also id.* at 791 (Rep. Willard) ("The city and the county have no power except the power that is given them by the State."); p. 24 *supra* (quoting Rep. Burchard). The majority thus objected that "if we have the right to lay this obligation upon them, to require them to meet these damages, it must draw after it the power to go in there and say, 'You shall have a police, you shall have certain rules by which you may fulfill your obligation'" to keep the peace. Cong. Globe at 795 (Rep. Blair).

In sum, the legislative history reveals "ample support for [Representative] Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly." 436 U.S. at 679. But, having reviewed this history, the Court in *Monell* concluded that Congress in 1871 did not create the same "Hobson's choice," because, instead of "imposing an obligation to keep the peace" that did not exist in state law, section 1983 applied only where "a municipality . . . was obligated by state law to keep the peace, but . . . had not in violation of the Fourteenth Amendment." *Id.*

2. *Application of the Requirement Here*

The *Monell* causation requirement is implicated here in two ways. First, of course, there is a glaring conflict between petitioner's position and the *Monell* Court's specific holding that section 1983 cannot be read to impose liability on municipalities for failure to enforce the law if state law does not grant them law enforcement powers. As the Eleventh Circuit held, the Monroe County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff. Yet petitioner now says that the County should face potential liability under section 1983 based entirely on the law enforcement actions of Sheriff Tate.

Indeed, under petitioner's theory, the Commission's only means of avoiding potential liability would be to violate state law and exceed its assigned authority by attempting to control the sheriff. But that is precisely the outcome that Congress sought to avoid when it rejected the Sherman amendment on the ground that it would force municipalities to perform law-enforcement functions not delegated to them by state law. Thus, here again, petitioner asks the Court to adopt a statutory interpretation that would undercut one of the central

understandings expressed in *Monell* itself.

At a more general level, this Court held in *Monell* that a municipality may not be held liable "*solely* because it employs a tortfeasor -- or, in other words, . . . on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis in original). It concluded that Congress, having rejected one limited form of vicarious liability based on constitutional concerns in the Sherman amendment, can hardly have intended to authorize a broader form that "would have raised all the constitutional problems associated with the obligation to keep the peace." *Id.* at 693. *See also Jett*, 491 U.S. at 728-29. The Court specifically rejected the idea that a municipality's "right to control the actions of a tortfeasor" is a sufficient reason for imposing *respondeat superior* liability. Petitioner's argument, however, would have the perverse effect of allowing a form of vicarious liability under section 1983 that is even more extreme than the *respondeat superior* theory rejected in *Monell*.

Respondeat superior is a doctrine that holds a "master" liable for the torts of a "servant" acting within the scope of his assigned duties. A "servant" is traditionally understood to be "a person employed to perform services in the affairs of another, whose physical conduct in the performance of the service *is controlled, or is subject to a right of control*, by the other." *Prosser & Keeton on Torts* § 70, at 501 (5th ed. 1984) (emphasis added). This principle has been consistently applied in the context of municipal liability law. Thus, one leading treatise states that, "in order to hold a municipality liable in damages because of the tort of one alleged to be its servant, it must appear, and the plaintiff must prove, that the latter was the servant of the municipality at the time of the alleged tort." McQuillan, *supra*, § 53.66, at 445. Moreover, "[t]he *right to control* the action of the person doing the alleged wrong, at the time of and with reference to the matter out of which the

alleged wrong arose . . . governs in determining whether a municipality is liable under the rule of respondeat superior. The right to *discharge* or *terminate the relationship* is also important." *Id.* (emphasis added). *See also id.* at 446 ("[A] county and its commissioners are not liable for the actions of the sheriff or the sheriff's deputies under the doctrine of respondeat superior because they have no control over the acts of those officers.") (citing *Delk v. Board of Comm'rs of Delaware County*, 503 N.E.2d 436 (Ind. App. 2 Dist. 1987)); Dillon, *supra*, § 974, at 1193 (municipality may be liable for acts of officials if it "appoints or elects them, can control them . . ., can continue or remove them, [and] can hold them responsible for the manner in which they discharge their trust"; it is not liable for the acts of those who are "independent of the corporation as to the tenure of their office and the manner of discharging their duties" and thus are properly regarded as "public or State officers"); *Parker v. Amerson*, 519 So. 2d at 442 (Alabama sheriffs are not county employees "for purposes of imposing liability . . . under theory of respondant superior"); *Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991) (same).

Yet petitioner, purporting to apply an "official policy" standard that was supposed to be more restrictive than *respondeat superior*, advocates a rule of vicarious liability that goes beyond *respondeat superior* -- indeed, beyond anything heretofore known to tort law. After all, he seeks to hold Monroe County strictly liable for the acts of an official over whom it has *no* control. And he does so in reliance on factors -- such as the Sheriff's election by local voters and funding through the County budget -- that have been specifically rejected as *insufficient* to justify municipal liability under a *respondeat superior* standard. *See Barnes v. District of Columbia*, 91 U.S. 540, 545-46 (1876) ("Nor can it in principle be of the slightest consequence by what means these several officers are placed in their position -- whether they are elected by the people of the

municipality or appointed by the President or a Governor."); *id.* at 546 ("It is equally unimportant from what source he receives compensation, or whether he serves without it."); McQuillan, *supra*, § 53.67.

Especially in view of this Court's admonition that, in interpreting section 1983, courts should "look first to the common law of torts," *Heck v. Humphrey*, 114 S. Ct. 2364, 2370-71 (1994), there is no reason to read the statute in this extreme way. Congress can hardly have intended in 1871 to authorize a form of municipal liability going far beyond *respondeat superior* and requiring cities and counties to exercise power in areas where they are barred from acting by state law.[28]

III. NONE OF PETITIONER'S OTHER ARGUMENTS PROVIDES A CONVINCING REASON FOR TREATING AN ALABAMA SHERIFF AS A COUNTY POLICYMAKER.

Beyond his reliance on the fact that Sheriff Tate "looks" like a county official, petitioner makes a few additional points. None provides a convincing basis for ignoring the clear dictates of state law requiring treatment of the Sheriff as a *state* official.

A. Nothing in *Pembaur* Supports Petitioner's Position.

Petitioner and his *amici*, while ignoring *Monell*, argue that this case is controlled by the Court's later decision in *Pembaur v. City of Cincinnati*. That case, however, did not deal with the same issue and does not support petitioner's

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[28] Thus, the proper reading of *Monell* is that satisfaction of the *respondeat superior* standard is a necessary but not sufficient basis for municipal liability based on acts of executive officials.

position in this case.

In *Pembaur*, the sole "question presented [was] whether, and in what circumstances, a decision by municipal policymakers *on a single occasion* may satisfy" the *Monell* official-policy requirement. 475 U.S. at 471 (emphasis added).[29] The Sixth Circuit had held that a county sheriff and a county prosecutor were county officials authorized to establish county policy, but had also held that approval of an illegal search on one occasion did not establish a "policy." *See id.* at 476. In the course of ruling that a single decision could constitute an actionable municipal "policy," this Court noted the Sixth Circuit's holding "based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances." *Id.* at 484. The Court went on to say that this was a "conclusion that we do not question here," *id.*, adding in a footnote that "[w]e generally accord great deference to the interpretation and application of state law by the courts of appeals," *id.* at 484 n. 13 (citations omitted).

As this summary indicates, it is inexplicable how petitioner could repeatedly assert that the question presented here was addressed and resolved in his favor in *Pembaur*.[30]

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[29] *See also* Brief of Petitioner in No. 84-1160, *Pembaur v. City of Cincinnati* (presenting, as a sole question presented, the following: "Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983?"); Brief of Respondents in *id.* (failing to contest the Sixth Circuit's holding that the sheriff is a county policymaker).

[30] *See* Pet. Br. at 6 ("In *Pembaur* . . . it has been *held* that when a sheriff is elected, funded and equipped by the county, with jurisdiction limited to the county, the sheriff is the county's final policymaker in the area of law enforcement.") (emphasis added); *id.* at 9 ("In *Pembaur*, a majority of this

There was no dispute in this Court about whether or not the sheriff in *Pembaur* had the kind of links with the county that made it possible for him to be viewed as a county policymaker. Moreover, when the Court touched on that question in passing, it declined to analyze it -- choosing instead to defer to a ruling of the Sixth Circuit on an issue of state law that had not been addressed in the parties' briefs.

In any event, even if *Pembaur* could be fairly read as having approved the Sixth Circuit's holding that a sheriff was a county policymaker, the case would have little relevance here. Any such holding in *Pembaur*, of course, would have been based on Ohio law, which, unlike Alabama law, plainly treats sheriffs as county officials.[31] That treatment reflects the fact that in Ohio, unlike in Alabama, county governments play a major role in law enforcement. County boards themselves play a significant role.[32] Moreover, each county has a *county*

Court *held* that a county sheriff in Ohio acted as a final policymaker for the county in the area of law enforcement.") (emphasis added); *id.* (because the Court affirmed the Sixth Circuit, "the Court *held* that the county was liable for the unconstitutional conduct of the sheriff in the performance of law enforcement functions").

[31] *See, e.g., State ex rel. Trago v. Evans*, 141 N.E.2d 665, 669 (Ohio 1957) (office of sheriff "is a county office created by legislative enactment"); Op. Ohio Att'y Gen. No. 90-091, at 9 (1990) ("[A] sheriff . . . and his deputies . . . are the chief law enforcement officers of a county.").

[32] As in Alabama, Ohio counties fund sheriffs and there is a sheriff in each county. Unlike Alabama, however, Ohio permits home rule, and its counties are recognized as having law enforcement power. *Compare* Op. Ohio Att'y Gen. No. 90-091, at 9 (counties may join with towns to coordinate regional law enforcement efforts), *with* Pet. App. 7a-8a (Alabama counties have no law enforcement role). Moreover, Ohio's chartered counties have significant control over their sheriffs. They control the manner in which sheriffs are chosen and may change the position of sheriff from an elective office to an

prosecutor who both works closely with the sheriff and serves as a legal advisor to all other county officials. *See Pembaur*, 475 U.S. at 484-85.[33] Thus, in Ohio, it would be impossible for anyone to conclude that counties are not authorized to have law enforcement policies.

In Alabama, by contrast, the district attorney is a state official whose operations may extend beyond a single county. Indeed, Sheriff Tate's close working relationship with the district attorney's office (and the Alabama Bureau of Investigations) on the very activities at issue in this case, *see* p. 2 *supra*, are among the most persuasive factors arguing against the proposition that he was simultaneously setting the law enforcement policy of Monroe County.

This Court has repeatedly made clear that identification of county policymakers turns on analysis of each state's law. *Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123. Here, the issue is one of Alabama law, and there is every reason for the Court to adhere to its stated practice of "accord[ing] great deference to the interpretation and application of state law" by the Eleventh Circuit in *this* case.

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appointive one. *See* Ohio Rev. Code Ann. § 302.01 (permitting chartered counties to choose an alternative form of government); Op. Ohio Att'y Gen. No. 85-039 (1985) (allowing the appointment of officers who are elected under general state law). In some instances, Ohio county boards select a replacement when the sheriff's office is vacant. *See* Ohio Rev. Code Ann. § 305.02.

[33] Indeed, as *Pembaur* was briefed in this Court, the sole claim of the petitioner was that the action of this county prosecutor in authorizing deputy sheriffs to engage in an unconstitutional forced entry constituted county policy. No action of the sheriff himself was even discussed. *See* Brief of Petitioner in No. 84-1160, *Pembaur v. Cincinnati*, at 11-13.

B. The Existence of a Potential Source for Payment of a Judgment, Other than the State Treasury, Does not Change the Outcome.

Petitioner points out that Monroe County has arranged insurance through the Association of County Commissions of Alabama Liability Self-Insurance Fund that might cover a judgment entered in this case against Sheriff Tate in his official capacity. He argues that the availability of this non-state funding source indicates that the Sheriff is not a state but a county official for purposes of the Eleventh Amendment -- and thus that the County may also be sued directly based on his actions. *See* Pet. Br. 18, 27 n. 13.

This argument is entirely circular and should be ignored. As the Eleventh Circuit recognized, Pet. App. 2a n. 2, if a court determined that the Sheriff was a county official, then the County would be liable for any judgment against the sheriff in his official capacity. But in insuring against this possibility, surely Monroe County cannot transform the Sheriff into a county official and thereby assume more responsibility for the Sheriff's action than it already bore. Given the prevailing legal uncertainty about the status of Alabama sheriffs, the County had every reason to protect itself against a possible judgment under section 1983 based on the Sheriff's action. But just as a private defendant's insurance is of no relevance to the merits of a tort suit, that the County has sought to protect itself from an adverse outcome in this case is similarly of no relevance. Moreover, it would be grossly unfair to conclude that, because some plaintiffs have chosen to assert claims against sheriffs in their official capacity on the theory that sheriffs are county officials, and because counties have chosen to obtain protection from such claims, counties have somehow waived their defenses or changed the allocation of governmental power in the state of

Alabama. Monroe County's liability must turn on an independent determination about whether the Sheriff is a county or a state official. The County's insurance bears not at all on this question.

C. Petitioner Has Offered No Other Persuasive Reason Why the Court Should Hold Municipalities Liable for the Actions of Officials Whom They Do Not Select or Control.

Petitioner and his *amici* also attempt to argue that it would be problematic, as a policy matter, to treat sheriffs in Alabama as something other than "walking county policymakers." These arguments are totally unpersuasive.

First, they argue that such an approach leaves states the power to insulate municipalities from all liability, simply by relabelling municipal officials as state officials. *See* Pet. Br. at 25-26; U.S. Br. at 14-15. But that makes no sense. The only way in which a state could limit municipal liability for the actions of senior municipal officials would be to change the law so that they are no longer controlled by the municipal legislative body. Merely designating a mayor or a city police chief as a "state official," without more, would change nothing in the typical municipal arrangement -- because any power exercised by these officials would still be subject to revocation or modification by the city council. And states are hardly likely to go on a binge of restructuring local government so that local lawmakers no longer have control over local executive officials.[34]

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[34] It is noteworthy, in this regard, that the Supreme Court's decision in *Lincoln County v. Luning*, 133 U.S. 529 (1890), which held that municipal corporations are not protected by the Eleventh Amendment, has had no apparent effect on the proliferation of municipal corporations and local

More fundamentally, petitioner and his *amici* seem to say that it would be unjust for him not to be able to sue a municipal defendant in this case. But that is probably the strangest of all of the arguments presented here. After all, it is the *norm* in section 1983 litigation for plaintiffs to be limited to suing individual defendants. That is what the statute, with its reference to "persons," was intended to accomplish. This Court has subsequently recognized that municipalities may be "persons" when they *cause* violations of federal rights. But it has also refused, in *Monell* and *Will*, to ignore the statutory language and hold that state and local governments should be held vicariously liable for violations of federal law committed by their officials and employees.

In sum, there is no reason to warp the principles of municipal liability in this case to give petitioner one more defendant to sue. Congress intended to allow municipalities to be sued under section 1983 in a specific set of circumstances -- when they adopt policies that lead to deprivations of federal rights. It is entirely spurious to suggest that, in this case, Monroe County did any such thing.

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government entities. *See* Melvyn R. Durchslag, *supra*. at 615. There is thus no reason to believe that a decision for respondent in this case would lead to a massive restructuring of local government.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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February 20, 1997

No. 96-542

In The

Supreme Court of the United States

October Term, 1996

WALTER MCMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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I. CONTRARY TO THE RESPONDENT'S MISTAKEN VIEW, *MONELL* DOES NOT RESTRICT MUNICIPAL LIABILITY TO ONLY THE ACTIONS OF LOCAL LEGISLATIVE BODIES AND DOES NOT PRECLUDE COUNTY LIABILITY FOR AN ALABAMA COUNTY SHERIFF'S UNCONSTITUTIONAL POLICIES IN THE AREA OF LAW ENFORCEMENT.

The whole of respondent's argument is premised on the mistaken view that only a single legislative municipal body can incur liability for a municipality. Under the respondent's theory, an unconstitutional policy implemented by a county official with final policymaking authority does not trigger county liability under § 1983 unless that county official's authority emanates from or is controlled by the county commission, as distinct from the county. The respondent thus argues that there is no county liability in this case because Monroe County Sheriff Tate's "authority over law enforcement does not emanate from the county commission and cannot be withdrawn by the county commission." Resp. Br. 6.

The respondent's argument does not turn on Alabama law but on an incorrect view of municipal liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). According to the respondent, *Monell* limits municipal liability to only those policies controlled or adopted by "a single governing board that controls [the municipality's] operations and either sets its policies or delegates that function to the officers." Resp. Br. 23. From this extremely restrictive view of municipal liability, which this Court has expressly rejected, the respondent argues that the county commission has no

authority or control over the sheriff and consequently that there can be no county liability in this case.

Contrary to the respondent's argument, this Court has recognized that government officials other than legislative bodies can be final local governmental policymakers.

> [I]t is when execution of a government's policy or custom, *whether* made by its lawmakers *or* by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell, 436 U.S. at 694 (emphasis added). As this Court made clear in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986):

> [T]he power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. Monell's language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," and whose decisions therefore may give rise to municipal liability under § 1983.
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> Indeed, any other conclusion would be inconsistent with the principles underlying § 1983 authority.

Id. at 480 (citation omitted).[1]

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[1] The federal district court in *Pembaur* initially dismissed the county as a defendant by adopting the same rationale respondent proffers here – that the "Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton

A. The County Commission's Absence of Control Over the Sheriff is Not Relevant.

The respondent's argument is rooted in its contention that Alabama county sheriffs are not "answerable *in any way* to county commissions." Resp. Br. 9; *see also* Jefferson County Amicus Br. 12-13. Regardless of whether this is factually correct, *see* Pet. Br. 16-19, § 1983 does not require a county commission to control a county official's conduct or policies to give rise to county liability. Elected executive officials often set governmental policy in areas in which they are subject to no legislative control or review. Just as a governor can set statewide executive policy on certain matters for which the state legislature has no oversight, or a mayor can set citywide policy on certain matters for which the city council has no oversight, a sheriff or a county tax assessor or a county coroner can set countywide policy on certain matters for which the county commission has no oversight.

For example, in Alabama the county tax assessor is elected by the county's voters and "in each of the several counties shall have the right and authority to assess all real estate . . . ." Ala. Code § 40-7-1 (1975). The "coroner for each county" is elected by the county's voters, Ala. Code § 11-5-1 (1975), and is discharged with "the general

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County Sheriff." *Pembaur*, 475 U.S. at 475 (quoting district court). However, this Court accepted the view as stated by the Sixth Circuit "that the County Board's lack of control over the Sheriff would not preclude county liability if 'the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter.' " *Id.* at 476 (quoting *Pembaur v. Cincinnati*, 746 F.2d 337, 340-341 (6th Cir. 1984)).

duty . . . to hold inquests." Ala. Code § 11-5-4 (1975). The county commission does not control or even supervise these functions. However, if a county tax assessor were to adopt an intentionally racially discriminatory policy of assessing taxes, or if the county coroner were to adopt a policy of refusing inquests for persons of a certain religious view, those unconstitutional policies could certainly be considered county policies even though the county commission has no oversight. Thus, governmental power is not the exclusive province of legislative bodies, and in some areas, elected executive officials speak for the government rather than legislative officials. This is why this Court has required that in determining whether liability under section 1983 exists, "the trial judge must identify those officials *or* governmental bodies who speak with final policymaking authority" for the municipality. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989).

In Alabama, the obligations of county government are dispersed to different entities and officials, all of whom may possess final policymaking authority in different areas. Yet, the respondent insists that only the unconstitutional policies of one of these entities, the county commission, generates county liability under § 1983. The respondent cannot explain what it is about the county commission that makes it the sole repository of county authority for the purposes of § 1983 liability when it is not the sole final policymaker for the county under Alabama law. Nor can the respondent explain why the final policies of the sheriff in law enforcement or the coroner or the tax assessor must somehow be subordinate to the county commission before the county can be liable.

B. *Monell* Does Not Require the Corporate Business Model of a Single Governing Board for Municipal Liability Purposes.

The respondent erroneously suggests that local governments are operated according to the typical corporate business model. According to the respondent, this Court's decision in *Monell* adopted a view of local government as being identical to corporate businesses. Resp. Br. 20-23. However, many local governments have a separation of powers between executive officials and legislative bodies, with executive officials setting policy in some areas and legislative officials in others. This Court has never held that governmental functions should be viewed through a corporate model or that legislative officials are the only officials who can ever set governmental policy for purposes of § 1983.

The specific portion of *Monell* which respondent cites to support its corporate model argument actually proves the contrary. The relevant point comes from *Monell's* discussion of the Dictionary Act, passed in 1871, shortly before the passage of what is now § 1983. Resp. Br. 21 (citing *Monell*, 436 U.S. at 687-89). As this Court stated in *Monell*, the Dictionary Act's definition of the word "person," which encompasses corporations *and* local governments, demonstrated that the subsequent use of "person" in § 1983 was also meant to include local governments. *Monell*, 436 U.S. at 688-689. However, this does not mean that municipalities operate with the same governing structure as typical business corporations. Instead, the Dictionary Act specifically drew a distinction between local governments and business corporations, stating "the

word 'person' may extend and be applied to bodies politic *and* corporate." *Monell*, 436 U.S. at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431) (emphasis added). Thus, nothing in the Dictionary Act or in *Monell* supports the respondent's contention that a local governmental structure must be viewed as a typical corporate business structure.[2]

The respondent incorrectly suggests that the petitioner's position is based upon a *respondeat superior* argument. As this Court established in *Pembaur*, "like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances." *Pembaur*, 475 U.S. at 483. Municipal liability for actions ordered by such officers exercising their policymaking authority is not an application of respondeat superior. *Id.*

C. The Absence of "Home Rule" in Alabama Counties Does Not Preclude County Liability.

The respondent argues that because "Alabama counties do not have 'home rule' powers" and because the county commission does not pass criminal laws, the

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[2] This is particularly true here where state courts have held that in Alabama "a county is not a corporation and has no corporate entity." *Housing Authority of Birmingham District v. Morris*, 14 So. 2d 527, 535 (Ala. 1943); *see also Moore v. Walker County*, 185 So. 175, 177 (Ala. 1938) (while a county has corporate characteristics it is not a corporation).

county cannot be liable for unconstitutional policies in the law enforcement area. Resp. Br. 11-12; *see also* Nat'l Assoc. of Counties Amicus Br. 16. The respondent concedes that Alabama law does confer on county sheriffs law enforcement authority but again contends that because the sheriff's authority is distinct from the county commission's authority, it must necessarily be distinct from the county. However, as petitioner argues in his opening brief, sheriffs in Alabama *are* the county officials with law enforcement authority. The sheriff's policymaking authority for the county is in no way dependent on similar law enforcement authority existing within the county commission or any other county official.

The absence of "home rule" in the county and the county commission's inability to pass criminal laws are simply not relevant. Even if the county commission had the authority to pass criminal ordinances, that "home rule" authority would not limit county liability under § 1983 to the enforcement of only those locally created ordinances.[3] When state or county law enforcement

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[3] By repeatedly limiting county authority and policy to only the authority and policy the county commission adopts or enacts, the respondent continually confuses the county with the county commission. For example, in the context of alcohol related crimes, *counties* in Alabama, not *county commissions*, determine whether the county shall be "dry." That is, county residents vote on whether the county will permit the sale and distribution of alcoholic beverages. Ala. Code § 28-2A-1 (1975). If the county elects to be a "dry" county, as Monroe County has, 1973 Ala. Act No. 564, then the sale, transport and distribution of alcoholic beverages becomes illegal. Ala. Code § 28-2-1(b) (1975).

agents happen to enforce federal rather than state criminal laws by arresting someone who violates federal law, they are nevertheless state or local policymakers for purposes of § 1983. That is, a municipality can have a variety of law enforcement policies that are unconstitutional and which create county liability under § 1983 even though the county commission did not enact the criminal laws that are being enforced.

In many states where federal courts have found that sheriffs are county final policymakers, state law similarly does not delegate law enforcement power to county commissions. Rather, like Alabama, the sheriff is the county's law enforcement official and county commissioners do not have any authority to make and enforce criminal laws.[4]

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[4] *Compare Turner v. Upton County, Texas*, 915 F.2d 133, 136-37 (5th Cir. 1990) (Texas county liable for sheriff who completely controls county law enforcement and is accountable to county voters), *cert. denied*, 498 U.S. 1069 (1991) *with* Tex. Local Gov't. Code § 81.028 (1997) (Texas county commissioners have no law enforcement authority); *compare Marchese v. Lucas*, 758 F.2d 181, 188-89 (6th Cir. 1985) (Michigan county liable for sheriff who is elected by county voters and is funded by county), *cert. denied sub nom. County of Wayne v. Marchese*, 480 U.S. 916 (1987) *with* Mich. Stat. Ann. § 5.283 (1996) (Michigan county commissioners have no law enforcement authority); *compare Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985) *with* Mass. Ann. Laws ch. 34, § 14 (1996) (Massachusetts county commissioners have no law enforcement authority); *compare Dotson v. Chester*, 937 F.2d 920, 925-32 (4th Cir. 1991) (Maryland county liable for sheriff even though under relevant state law sheriff is considered state officer for purposes of state tort liability) *with* Md. Ann. Code art. 25, § 1 (1996) (Maryland county commissioners have no law enforcement authority).

The respondent asks this Court to adopt an extremely restrictive approach to municipal liability that this Court has previously rejected and that is fundamentally at odds with *Monell* and its progeny.

II. WHERE COUNTY RESIDENTS ELECT THE COUNTY SHERIFF, WHERE THE COUNTY TREASURY FUNDS AND EQUIPS THE SHERIFF, AND WHERE THE SHERIFF'S LAW ENFORCEMENT AUTHORITY IS LIMITED TO THE JURISDICTION OF THE COUNTY, THE SHERIFF IS A FINAL POLICYMAKER FOR THE COUNTY RATHER THAN THE STATE.

The respondent asserts that county sheriffs in Alabama are state officials who cannot create a basis for county liability under § 1983. The respondent's assertion that Alabama law "gives an explicit and unambiguous" designation to sheriffs as state officials, Resp. Br. 11, is simply not supported by a review of Alabama law. Pet. Br. 22-24. Moreover, even if the respondent were right, state designations do not control. In addition, the respondent places much emphasis on the fact that state courts in Alabama frequently assign no liability to counties for improper conduct by sheriffs under state law. Resp. Br. 13. However, as this Court recently recognized, where federal constitutional concerns are at issue, the determination of whether a local policymaker is a state or county official is "a question of federal law." *Regents v. Doe*, 65 U.S.L.W. 4129, 4130 n.5 (Feb. 19, 1997); *see also Howlett v. Rose*, 496 U.S. 356, 376-78 (1990) (holding that Florida law which granted immunity to municipal entities did not preclude § 1983 claim against county school

board); *Martinez v. California*, 444 U.S. 277, 284 (1980) (asserting that California statute which immunized parole decision makers did not control § 1983 claim against public employees).

The Eleventh Circuit conceded below that the sheriff's occasionally applied label as a state official in Alabama is insufficient to establish that the sheriff is a policymaker for the state rather than the county. *McMillian v. Johnson*, 88 F.3d 1573, 1580 (11th Cir. 1996); Pet. App. 13a. This is particularly true where the basis for this label is the ambiguous inclusion of a "sheriff for each county" in the Alabama Constitution provision which lists members of the state executive department. Ala. Const. art V, § 112 (1901). The respondent attempts to buttress this contention by arguing that the sheriff works "for other state officials" by assisting the state judicial system, operating the county jail and enforcing state law in their county. Resp. Br. 13.

However, the fact that county sheriffs in Alabama serve process for state judicial courts or enforce state laws in their counties by no means establishes that sheriffs are not policymakers for the county. Municipal officials frequently work with state agencies and government officials as part of their duties, but this does not alter their final policymaking authority for their municipality. Alabama law dictates that "[i]t shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties*. . . . " Ala. Code § 36-22-3(4) (1975) (emphasis added); Pet. App. 82a. The fact that many of the criminal statutes enforced by county sheriffs are state

statutes is simply an insufficient basis to make the sheriff a policymaker for the state rather than the county. Rather, the sheriff is a county officer because county residents elect the sheriff, the county treasury funds and equips the sheriff, and the sheriff has final policymaking authority within but not outside the county.[5]

The respondent additionally argues that sheriffs are policymakers for the state rather than the county because sheriffs are subject to impeachment by state officials. However, Alabama law expressly authorizes state impeachment against all county and municipal officials including sheriffs, county treasurers, tax assessors, coroners "and all other county officers and mayors and intendants of incorporated cities and towns in this state." Ala. Code § 36-11-1 (1975).

Moreover, impeachment is a very rare event. *See Parker v. Amerson*, 519 So. 2d 442, 444 n.1 (Ala. 1987) (citing only three cases dealing with impeachment of sheriffs). Much more relevant are the people who have the power to choose the sheriff at each regular election, and to turn out an incumbent candidate if he or she is not performing satisfactorily – the voters of each county. The role of the county voters is vastly more important in controlling the activities of the sheriff and in determining who serves and does not serve than the role of state officials on those

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[5] The respondent's argument that the sheriff's operation of the county jail proves that the sheriff is a policymaker for the state, Resp. Br. 13-14, actually proves the contrary. As the Eleventh Circuit has held, the sheriff's operation of the county jail is a county function for which counties are liable under § 1983. *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989).

extremely infrequent occasions when impeachment is attempted. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981) (compensatory damages awarded against a local government under § 1983 "may themselves induce the public to vote the wrongdoers out of office").

Additionally, while no relationship between the sheriff and the county commission is necessary for county liability purposes under § 1983, there is, in fact, a very clear relationship in Alabama between the county commission and other county officials with the county sheriff. As discussed in petitioner's opening brief, Pet. Br. 14-19, the county commission finances all law enforcement programs, furnishes and equips all operations by the sheriff, establishes budgetary appropriations regarding the sheriff's staffing, training, equipment and overtime pay and may regulate and determine the classification and rank of deputy sheriffs. The county coroner additionally must exercise the sheriff's law enforcement authority when the sheriff cannot discharge his or her duties. *See* Ala. Code § 11-5-5 (1975); *see also* Ala. Code § 15-4-9 (1975).[6]

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[6] At the end of its brief, the respondent attempts to limit the impact of *Pembaur* in this case by alleging various distinctions between Ohio and Alabama law. Resp. Br. 32-35. It should be noted that the points of distinction raised by the respondent were not relied upon by the Sixth Circuit in finding the county liable for the Ohio sheriff's conduct. The respondent's primary assertion that the sheriff is a county officer in Ohio, Resp. Br. 32, is based on references in Ohio law to the sheriff as a county officer that can similarly be found with regard to an Alabama sheriff under state law. *See* Pet. Br. 22-24. The respondent's additional argument that the Ohio sheriff is under the control of the county prosecutor, Resp. Br. 35, further illuminates the error of their initial argument that county liability exists only where a sheriff is under the control of the county commission. *See supra*.

CONCLUSION

There is no requirement under *Monell* or its progeny that a county sheriff's law enforcement authority be controlled or regulated by some local governing board before there can be county liability under § 1983. The respondent's argument that the sheriff is sometimes labeled a state officer and maintains a working relationship with other state officials or the state judicial system does not alter the sheriff's status and functioning as a final policymaker for the county. Consequently, where the county sheriff exercises final policymaking authority for the county in the area of law enforcement in an unconstitutional manner the county may be liable under § 1983. The Eleventh Circuit's contrary ruling in this case is thus in error and should be reversed and vacated by this Court.

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March 6, 1997

(5)

No. 96-542

In the Supreme Court of the United States

OCTOBER TERM, 1996

WALTER MCMILLIAN, PETITIONER

v.

MONROE COUNTY, ALABAMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the sheriff of Monroe County, Alabama, is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. 1983.

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INTEREST OF THE UNITED STATES

Section 1983 is the basic federal statute providing civil remedies for deprivations of federal rights by state and local officials. 42 U.S.C. 1983. The United States has a strong interest in ensuring that this statute is interpreted with adequate breadth to serve its intended purpose. Private parties suing under Section 1983 to enforce federal rights act not only on their own behalf, but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority. The United States filed a brief as amicus curiae in *Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203, 1207-1212 (1995), in which

the precise question raised in this case was presented but not reached because this Court concluded that the court of appeals in that case had lacked jurisdiction to consider the issue.

STATEMENT

1. In 1988 petitioner was convicted for the murder of a woman in Monroe County, Alabama. After he spent nearly six years on Alabama's death row, including over a year before his trial (Pet. App. 1a), petitioner's conviction was overturned on appeal because the prosecution failed to disclose exculpatory and impeachment evidence in violation of petitioner's due process rights. *McMillian* v. *State*, 616 So. 2d 933, 941-948 (Ala. Crim. App. 1993). The State released petitioner and initiated a new investigation to identify the murderer. Pet. App. 2a, 33a.

Following his release, petitioner filed suit in United States District Court against Monroe County; Thomas Tate, the Sheriff of Monroe County; and various state officials responsible for petitioner's arrest, imprisonment, and conviction. Pet. App. 2a. In a twenty-seven count complaint, petitioner alleged that the defendants had violated his rights under the United States Constitution, the Alabama Constitution, and Alabama statutory and common law. *Id.* at 34a-35a. The complaint alleged that Sheriff Tate had, *inter alia*, falsely arrested petitioner (First Amended Compl. ¶ 31); conspired to put petitioner on death row prior to his trial (*id.* at ¶ 19); suppressed exculpatory evidence (*id.* at ¶¶ 22, 25, 28-30); threatened and intimidated witnesses into giving false evidence implicating petitioner (*id.* at ¶¶ 23, 26-27); and falsely testified before the grand jury (*id.* at ¶ 33).

Petitioner sued Monroe County under 42 U.S.C. 1983, alleging that the county was liable for the unconstitutional acts of Sheriff Tate because the sheriff's "edicts and acts may fairly be said to represent [the] official policy [of] . . . Monroe County . . . in matters of criminal investigation and law enforcement." Pet. App. 2a (quoting First Amended Compl. ¶ 53). The complaint further alleged that the sheriff's actions "were undertaken as part of an unwritten policy and custom attributable to * * * Monroe County, Alabama, of withholding exculpatory evidence in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony, and of instigating unwarranted and malicious criminal prosecutions." Pet. App. 51a-52a (quoting First Amended Compl. ¶ 53).[1]

Relying on the Eleventh Circuit's decision in *Swint* v. *City of Wadley*, 5 F.3d 1435 (1993), vacated *sub nom. Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203 (1995), the district court granted the county's motion to dismiss. Pet. App. 25a-76a. In *Swint*, the court of appeals held that an Alabama sheriff "is not the final repository of [an Alabama county's] general law enforcement authority, because [the county] has none." 5 F.3d at 1451. Pursuant to

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[1] Similar allegations were made against defendant Larry Ikner, an investigator for the Monroe County District Attorney's office. Pet. App. 51a-53a. Because petitioner did not appeal the district court's ruling that the county was not liable for the alleged acts of defendant Ikner, that question is not before the Court.

28 U.S.C. 1292(b), petitioner appealed the district court's order dismissing the county. Pet. App. 3a.

2. The court of appeals affirmed. Pet. App. 1a-24a.[2] The court acknowledged that, under *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), a "county, or other local government entity is a 'person' that may be sued under § 1983 for constitutional violations caused by policies or customs made by lawmakers or by 'those whose edicts or acts may fairly be said to represent official policy.'" Pet. App. 5a (quoting *Monell*, 436 U.S. at 694). In addition, the court of appeals observed that "state and local positive law, as well as custom and usage having the force of law" should direct the court "to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." Pet. App. 6a (quoting *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 125 (1988) (plurality opinion)).

The court of appeals took "a fresh look" at its decision in *Swint*, *supra*, which this Court had vacated after the district court's decision. Pet. App. 7a. According to the court of appeals, *Swint* posed the "critical question under Alabama law * * * whether

[2] Petitioner was also permitted to appeal the district court's order granting partial summary judgment to various individual defendants on petitioner's claim that they coerced prosecution witnesses into giving false trial testimony. Pet. App. 3a, 19a. The court of appeals affirmed the district court's decision that petitioner could not defeat summary judgment by offering hearsay statements that would be inadmissible at trial. *Id.* at 19a-23a. In a separate decision announced the same day, the court of appeals affirmed in part and reversed in part the district court's order denying several defendants' motions for summary judgment based on qualified immunity. *McMillian* v. *Johnson*, 88 F.3d 1554 (1996).

an Alabama sheriff exercises county power with final authority when taking the challenged action." *Ibid.* The court explained that its "examination of Alabama law revealed that Alabama counties have no law enforcement authority" because "Alabama law assigns law enforcement authority to sheriffs but not to counties." *Id.* at 7a-8a. The court then reaffirmed its decision in *Swint* and concluded that "a sheriff does not exercise county power when he engages in law enforcement activities and, therefore, is not a final policymaker for the county in the area of law enforcement." *Id.* at 8a.

The court further noted that this Court "has not addressed whether a municipality must have power in an area to be held liable for an official's act in that area," but that a "threshold question * * * is whether the official is going about the local government's business." Pet. App. 8a. The court answered that question by concluding that "the existence of county law enforcement power is a prerequisite to a finding that a sheriff makes law enforcement policy for a county." Id. at 14a. The court explained that petitioner "may be correct that, under principles of representative government, an official elected locally should not set statewide 'policy'" and that the "'policy' of a state connotes a single policy rather than one state 'policy' per county." *Id.* at 9a-10a. The court stated, however, that "when 'policy' is understood as a § 1983 law term of art, we see no reason why a county sheriff may not be a final policymaker for the state in the area of law enforcement insofar as state law assigns sheriffs unreviewable state law enforcement power." *Id.* at 10a.

The court of appeals distinguished this Court's decision in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483-484 (1986), in which the Court approved of the Sixth Circuit's conclusion in that case that sheriffs in Ohio set final county policy for matters of law enforcement under Section 1983. The Eleventh Circuit panel explained that "Ohio law determined the Sixth Circuit's conclusion. But Alabama law controls our conclusion." Pet. App. 11a. The court was unpersuaded by the fact that in Alabama, like Ohio, "sheriffs are elected by the residents of their counties; receive their salaries, expenses, offices, and supplies from their counties; and serve as the chief law enforcement officers in their counties." *Id.* at 11a-12a. The court reasoned that Alabama law was different because "a sheriff is a state officer according to the [Alabama] constitution" and a member of the State's executive branch. *Id.* at 12a. As such, Alabama law provides that "counties may not be held vicariously liable for sheriffs' actions." *Ibid.* (citing *Hereford* v. *Jefferson County*, 586 So. 2d 209 (Ala. 1981), and *Parker* v. *Amerson*, 519 So. 2d 442 (Ala. 1987)). Moreover, the court noted that "as state executive officers, Alabama sheriffs are protected by the state's sovereign immunity under * * * the Alabama Constitution." *Ibid.*

Finally, the court distinguished its earlier decision in *Parker* v. *Williams*, 862 F.2d 1471 (11th Cir. 1989). Pet. App. 14a-16a. *Parker* held that a county *was* liable under Section 1983 in the area of a sheriff's hiring and training jail personnel because "in practice, Alabama counties and their sheriffs maintain their

county jails in partnership." Pet. App. 14a. The court found *Parker* not controlling because "important aspects of Alabama law evincing county power in the jail maintenance area find no parallel in the law enforcement area." *Id.* at 15a.

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that Monroe County could not be held liable for the unconstitutional law enforcement practices of its sheriff. Local government entities are liable under Section 1983 for unconstitutional conduct of officials who have final policymaking authority over the subject matter in question. *Pembaur* v. *City of Cincinnati*, 475 U.S. at 483-484 (plurality opinion). To determine where policymaking authority lies for those purposes, a trial court must look to state and local statutory and decisional law, as well as to custom or usage having the force of law, and identify the officials or government bodies that have final policymaking authority in regard to the particular action challenged. *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988) (plurality opinion). In Alabama the sheriff is elected by county voters and exercises his jurisdiction within the county. State law requires the county to pay the sheriff's salary and to fund all the operations of his office. The court of appeals therefore erred in concluding that the county could not be held liable for the sheriff's unconstitutional exercise of his authority in this case.

ARGUMENT

THE COURT OF APPEALS ERRED IN RULING THE COUNTY COULD NOT BE LIABLE UNDER SECTION 1983

A. Counties Are Liable Under 42 U.S.C 1983 For Unconstitutional Action By Their Officials Who Have Final Authority To Establish The County's Policy With Regard To The Actions Challenged

Local governmental bodies are "included among those persons to whom § 1983 applies," and therefore they may be sued under Section 1983 for monetary, declaratory, or injunctive relief when they commit a constitutional tort. *Monell*, 436 U.S. at 690.[3] A local government is liable only when it has committed the constitutional violation, however, and not merely because one of its employees commits such a violation. *Pembaur*, 475 U.S. at 478-479. The Court has emphasized that a government is responsible under Section 1983 when the injury alleged is inflicted by "execution of [the] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy[.]" *Monell*, 436 U.S. at 694. A government may be liable for a single decision by an official if the

[3] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

official is "the official or [one of the] officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483-484 (plurality opinion). An official can derive his authority to make final policy decisions from legislation, from formal delegation from another official of entity, or from custom or usage. See *Praprotnik*, 485 U.S. at 124 & n.1.

Two decisions of the Court since *Pembaur* have described the method by which a court should determine whether final authority to make municipal policy is vested in a particular official. In *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. at 737, a majority of the Court reaffirmed the analysis set forth in the earlier plurality opinion in *City of St. Louis* v. *Praprotnik*, 485 U.S. at 123-124. In *Praprotnik*, the Court "attempted a clarification of tools a federal court should employ in determining where policymaking authority lies for purposes of § 1983." *Jett*, 491 U.S. at 737. The Court reaffirmed that the identity of the final policymaker must be decided by reference to state law and must be determined by the trial court before a case is submitted to the jury. *Ibid.* The trial court must review "the relevant legal materials, including state and local positive law, as well as 'custom or usage having the force of law,'" and thereby "identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Ibid.* (quoting *Praprotnik*, 485 U.S. at 124 n.1). Once that identification is made, the factfinder must determine whether the decisions of the policymaking authority caused the deprivation of rights at issue either by com-

manding that action occur or by acquiescing in a longstanding practice or custom of the local government. *Jett*, 491 U.S. at 737.

In *Pembaur* the Court noted that a county sheriff's decisions in regard to law enforcement practices generally would give rise to county liability because in that area the sheriff "*is* the official policymaker." 475 U.S. at 483 n.12. The Court approved of the court of appeals' conclusion that, under Ohio law, the county sheriff and prosecutor established county policy in regard to law enforcement practices. *Id.* at 484-485. In reaching that conclusion, the court of appeals in *Pembaur* had relied on a statutory scheme strikingly similar to the facts in the instant case. See *Pembaur* v. *City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984) (citing fact that county residents elect sheriff, county pays sheriff's salary and provides budget for sheriff's office, county provides sheriff with equipment and office necessities, and sher-iffs serve as chief law enforcement officers in each county).

Other courts of appeals have reached the same conclusion after examining similar statutory schemes in other states. As the First Circuit wrote in *Blackburn* v. *Snow*, 771 F.2d 556, 571 (1985), in Massachusetts the county is liable under Section 1983 for the sheriff's misconduct because the sheriff is "the county official who was elected by the County's voters to act for them and to exercise the powers created by state law." See also *Crane* v. *Texas*, 766 F.2d 193, 195 (5th Cir.) (per curiam) (Texas county may be held liable for the actions of its district attorney where, "much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but

limited in the exercise of those powers to the county, filled by its voters, and paid for with its funds"), cert. denied, 474 U.S. 1020 (1985); *Marchese* v. *Lucas*, 758 F.2d 181, 188-189 (6th Cir. 1985) (Under Michigan law, "Wayne County did not make policy for the Sheriff's Department. The Sheriff is, however, the law enforcement arm of the County and makes policy in police matters for the County."); *Gobel* v. *Maricopa County*, 867 F.2d 1201, 1208-1209 (9th Cir. 1989) (Arizona county attorney who is elected by county voters may be final policymaker for county for purposes of establishing county liability). See also *Turner* v. *Upton County*, 915 F.2d 133, 136 (5th Cir. 1990) (Texas county sheriff final policymaker in the area of law enforcement, including "investigation of crimes" and "collection of evidence"), cert. denied, 498 U.S. 1069 (1991); *Crowder* v. *Sinyard*, 884 F.2d 804, 828 (5th Cir. 1989) (Arkansas county sheriff final policymaking official for law enforcement activities), cert. denied, 496 U.S. 924 (1990); *Dotson* v. *Chester*, 937 F.2d 920, 924-932 (4th Cir. 1991) (Maryland sheriff final policymaker when operating county jail); *Lucas* v. *O'Loughlin*, 831 F.2d 232, 235 (11th Cir. 1987) (Florida sheriff "acted for the county in performing the functions for which he was elected"). But see, *e.g.*, *Thompson* v. *Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) (Illinois county not liable for the misconduct of its sheriff in his administration of the county jail), cert. denied, 495 U.S. 929 (1990).

B. The Monroe County Sheriff Has Final Policymaking Authority Over Law Enforcement For The County

The court of appeals correctly noted that "state law determines whether a particular official has final

policymaking authority." Pet. App. 6a. The court also correctly concluded that the Sheriff of Monroe County has final policymaking authority over law enforcement activities. *Id.* at 10a ("state law assigns sheriffs unreviewable state law enforcement power" within their respective counties). The court, however, improperly concluded that those activities were not "the local government's business." *Id.* at 8a.

1. *Under Alabama law, the county sheriff exercises final policymaking authority in regard to law enforcement activities for the county*

Alabama law clearly makes the county sheriff the final policymaking official in charge of law enforcement *within his county*. Alabama law specifies that "[i]t shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county." Ala. Code § 36-22-3(4) (1991). Similarly, an Alabama "sheriff is the principal conservator of the peace in his county, and it is his duty to suppress all riots, unlawful assemblies and affrays." *Id.* § 15-6-1 (1995). In the execution of that duty, the sheriff "may summon to his aid as many of the men of his county as he thinks proper." *Ibid.* Moreover, an Alabama county sheriff has no authority to enforce the law outside of his county (see *id.* § 36-22-3(4) (1991); *id.* § 15-10-1 (1995)), and state law identifies no other official or entity as authorized to make final policymaking decisions over law enforcement in a particular county. Nor does any official with state-

wide jurisdiction supervise the sheriff in the exercise of his law enforcement authority.

The fact that "Alabama law assigns law enforcement authority to sheriffs but not to counties" (Pet. App. 8a) does not mean that the sheriff acts without "county power." Indeed, that the sheriff's policies are "unreviewable" (*id.* at 10a) simply reinforces the fact that Alabama law confers on county sheriffs final policymaking authority over law enforcement matters within their jurisdictions.[4] Where an officer has policymaking authority for a governmental entity by virtue of the powers and duties assigned to his office by state law, the officer is a final policymaker of the entity under Section 1983 without regard to whether he shares that authority with any other official or entity. In Alabama, as in several other states, the sheriff is, quite simply, the "county official who was

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[4] Respondent argues (Br. in Opp. 19-21) that imposing liability on the county for the sheriff's actions is inconsistent with *Monell*, because a corporation ordinarily does not normally include both a governing board and a separate official that the board does not control. This Court, however, has held that liability under Section 1983 extends to "lawmakers *or* those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694 (emphasis added); see also *Jett*, 491 U.S. at 737 ("trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local government"). Thus, the sheriff's final authority over law enforcement matters simply reflects familiar principles of separation of powers, and nothing in *Monell* supports shielding the county from liability caused by the unconstitutional conduct of one of its final policymakers. For those same reasons, respondent's argument that imposing Section 1983 liability on the county for the sheriff's unconstitutional conduct imposes liability under an "extreme * * * *respondeat superior* theory" (Br. in Opp. 25) is misplaced.

elected by the County's voters to act for them and to exercise the power created by state law." *Blackburn*, 771 F.2d at 571. Accord, *e.g.*, *Turner*, 915 F.2d at 136 ("[T]he county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected.").[5]

The court of appeals accorded undue weight to the fact that Alabama's executive office includes "a sheriff for each county" and that "sheriffs enjoy a special status as state officers under Alabama law." Pet. App. 12a-13a. As the court of appeals recognized, "a state cannot insulate local governments from § 1983 liability simply by labeling local officials state officials." *Id.* at 13a n.4. See also *Dotson*, 937 F.2d at 932 ("Although the county's *authority* to provide a service may be vested in an official designated as a state official, the county cannot be insulated from liability based on its *responsibilities* with regard to that service by the simple expedience of vesting

[5] The reasoning of the court of appeals below also appears to reflect some confusion regarding the means by which the sheriff could be vested with final policymaking authority for the county. The complaint alleged that Sheriff Tate's unconstitutional actions "were undertaken as part of an unwritten policy and custom attributable" to the county. Pet. App. 51a. This Court has made clear that consideration of state statutory and decisional law does not end the matter and that a court must also consider state custom and usage regarding the locus of county policymaking authority. *Jett*, 491 U.S. at 737. Thus, even if the court of appeals correctly concluded that state statutory law does not assign counties law enforcement duties, dismissal of the county would not have been appropriate, because the trial court should have considered whether any evidence of custom and usage supported petitioner's claims.

power in a state official" (quoting *Parker*, 862 F.2d at 1479) (emphasis added by *Parker*).). Similarly, immunity under state law does not translate into immunity under Section 1983. See *Hufford* v. *Rodgers*, 912 F.2d 1338, 1341 (11th Cir. 1990) ("State sovereign immunity may protect Sheriff Rodgers from state claims in state court; state immunity, however, has no application to claims, in federal court, under Section 1983."), cert. denied, 499 U.S. 921 (1991).[6] In any event, Alabama law has not consistently characterized sheriffs as "state" as opposed to "county" officers. See, *e.g.*, Ala. Code § 36-3-4(a) (1991) ("county officers," including sheriffs, elected to 4-year terms); § 36-15-1(1)b (Supp. 1996) (Attorney General must give legal opinions to "county or city officers," including sheriffs, when requested); § 36-22-16(a) (1991) (sheriffs paid like "other county employees").

2. Under Alabama law, counties have duties and responsibilities in regard to law enforcement by the county sheriff

Alabama law places the financial responsibility for a sheriff's law enforcement activities on the county government. Under Alabama law, a county is obligated to compensate the county's sheriff by a designated annual salary paid "out of the county treasury as the salaries of other county employees are paid."

[6] Presumably no one would suggest that counties would not be liable under Section 1983 merely because Alabama defined state officers to include all county officers and similarly immunized counties from suit. Yet until 1975 Alabama law had characterized a county as "an arm of the State * * * subject to immunity from suit which the State has." *Laney* v. *Jefferson County*, 32 So. 2d 542, 543 (Ala. 1947); see *Roberts* v. *Meeks*, 397 So. 2d 111, 113 (Ala. 1981).

Ala. Code § 36-22-16(a) (1991). Not only does state law thus expressly characterize the sheriff as a county employee, it makes clear that the county must financially support its sheriff and has the authority to provide a higher salary "by law by general or local act." *Id.* § 36-22-16(a). Alabama law also compels the county commission to "furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office." *Id.* § 36-22-18; see also *id.* § 11-12-14 (1989) (county to pay for sheriff's "books, stationary, postage stamps * * * and telephones")). State law further obligates the county to pay for any special investigations by the sheriff and requires the county to audit the sheriff's request for such funding. *Id.* § 36-22-6(a) (1991). In addition, state law authorizes the county commission to pay from the county's general fund "all dues, fees and expenses of the sheriffs * * * that are incurred by such individuals through membership in and/or attendance at official functions of their state organizations," and the sheriff's membership dues in state and national sheriff's associations. *Id.* § 11-1-11 (1989); *id.* § 36-22-19 (1991).[7]

With respect to revenues, Alabama law provides that the county commission is to collect various fees

[7] In addition to paying the salary of the sheriff and fully funding all necessary expenses of the operations of the sheriff's office, certain counties are required by state law to administer a retirement system for the sheriff through the county general fund. See Ala. Code §§ 36-22-40 to 36-22-45 (1991).

and commissions that previously were collectible "for the use of the sheriff and his deputies," and pay them into the county's general fund. Ala. Code § 36-22-17 (1991). The County Commission also has the authority to direct that the sheriff pay to the county's general fund the amounts received for feeding prisoners, which the sheriff is entitled to retain absent such direction by the county commission. *Ibid.* The sheriff must render to the county treasury or custodian of county funds a periodic written statement of the moneys received by him for the county. *Id.* § 36-22-3(3).

Alabama law also provides that the county voters elect the sheriff. Ala. Const. art. V, § 138. Those voters thus have the ultimate capacity to control the sheriff's activities. The Eleventh Circuit recognized this point in *Parker*:

> From a policy point of view, county liability where the county has limited control over policy decisionmakers does not strike us as misplaced. The fact that a sheriff executes county policy with considerable autonomy from the county is undercut by the sheriff's dependence on county voters. Arguably, because an Alabama sheriff is voted into office by county residents, the sheriff is more accountable to the county electorate than to the county government. A finding of liability against the county translates into compensatory damages against the taxpayers of the county. One thus comes full circle: "[T]he compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office."

862 F.2d at 1481 n.10 (citing *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981)).[8] In addition, citizens of the county have direct authority to require that the county sheriff make an investigation and report regarding any alleged violations of the law in the county. Ala. Code § 36-22-6(b) (1991). Under this provision, 25 reputable county citizens may sign a written request to that effect and submit it to the district attorney for the county, who must then direct the sheriff to make such an investigation and report. *Ibid.*; see also *id.* §§ 36-22-5, 36-22-6(a) (expenses of special investigation directed by attorney general or governor payable from county treasury).

3. *The Eleventh Amendment does not bar petitioner's claims under Section 1983*

Although the court of appeals did not rely on the point, respondent argues (Br. in Opp. 25) that because sheriffs have been held to be immune from suit in federal court under the Eleventh Amendment (see, *e.g.*, *Carr* v. *City of Florence*, 916 F.2d 1521, 1526 (11th Cir. 1990); *Parker*, 862 F.2d at 1475-1476; *Free* v. *Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989)), the sheriff cannot "logically * * * be deemed a county policy maker." Petitioner's claims against Sheriff Tate in his official capacity, however, must be viewed as claims against the county, which is the entity the sheriff represented in carrying out the challenged

[8] Although Alabama sheriffs may be removed from office through impeachment at the state level (see Ala. Const. art. V, § 138; *id.* VII, § 174), the county's power to vote its sheriff out of office is a more realistic measure of control. Moreover, in the event the sheriff is "incompetent" or "imprisoned," the county coroner discharges the duties of the sheriff. Ala. Code. § 11-5-5 (1989).

action in this case. *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985) ("a judgment against a public servant 'in his official capacity' imposes a liability on the entity that he represents"); accord *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991); *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985).[9]

The fact that Alabama sheriffs, like other local government entities and officials, ultimately derive their authority from the State, is not dispositive. See *Hess* v. *Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394, 404 (1994) (noting that cities and counties do not enjoy Eleventh Amendment immunity even though "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates"). Alabama sheriffs

[9] The court of appeals treated petitioner's claims against the sheriff in his official capacity as stating claims against the county. Pet. App. 2a n.2; see also *id.* at 35a. As such, any judgment should be payable only against the county treasury. See *Crane*, 766 F.2d at 195. See also Ala. Code § 11-3-11 (1989) (counties may "levy a general tax, for general county purposes"). Eleventh Circuit decisions have assumed that because a sheriff is a state official under state law, the state treasury would satisfy any judgments against sheriffs. *Parker*, 862 F.2d at 1475-1476; *Carr*, 916 F.2d at 1526; *Free*, 887 F.2d at 1557. We are not aware of any provision of Alabama law, however, that would authorize state funds, rather than county funds, to pay any judgment rendered against the sheriff in his official capacity in this case. Indeed, the fact that Monroe County has an insurance policy for losses arising out of law enforcement activities by county-elected officials strongly suggests that the county considers that it would be liable for judgments against Sheriff Tate in the absence of that policy. Pet. App. 77a; August 4, 1993, Motion to Intervene by Ass'n of County Commissions of Alabama Liability Self Insurance Fund. Cf. Ala. Code § 11-30-2 (1989) (authorizing counties to appropriate money to establish self-insurance funds to cover tort liabilities of county officials).

serve the counties that pay and elect them. A sheriff thus is properly viewed as a local official when he is sued for unconstitutional conduct arising from his duties as the chief law enforcement officer for his county. For those reasons, the Eleventh Amendment would bar neither petitioner's claims against the county nor petitioner's claims against the sheriff in his official capacity. See generally *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890); *Moor* v. *Alameda County*, 411 U.S. 693, 717-721 (1973); *Mount Healthy City School District* v. *Doyle*, 429 U.S. 274, 280 (1977).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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JANUARY 1997

No. 96-542

In The

Supreme Court of the United States

OCTOBER TERM, 1996

WALTER McMILLIAN,
Petitioner,

v.

MONROE COUNTY, ALABAMA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE* SUPPORTING PETITIONER

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January 1997

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QUESTION PRESENTED

Whether the sheriff of an Alabama county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983 (1994).

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The American Civil Liberties Union and the Lawyers' Committee for Civil Rights Under Law respectfully submit this brief *amici curiae* in support of the petitioner. Pursuant to Rule 37, all parties before this Court have consented to the filing of this brief.

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and defending constitutional rights. The ACLU has appeared before this Court, both as counsel for parties and as *amicus curiae*, in numerous cases, including *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995). Because the decision below would substantially curtail the ability of many individuals to obtain meaningful relief for violations of their constitutional rights by law enforcement officials, this case raises issues of significant concern to the ACLU and its members.

The Lawyers' Committee for Civil Rights Under Law is a national civil rights organization that was formed in 1963 by leaders of the American bar at the request of President Kennedy to provide legal representation to African-Americans who were being deprived of their civil rights. The Lawyers' Committee has appeared before this Court, both as counsel for parties and as *amicus curiae*, in numerous cases, including *Swint*. The Lawyers' Committee and its local affiliates have represented thousands of individuals who have brought claims against municipalities under 42 U.S.C. § 1983. Section 1983 is the primary vehicle for the enforcement of the constitutional protection of Equal Protection and Due Process with regard to state and local governments, including deprivations and injuries caused by discrimination on the basis of race, national origin, and gender. A decision affirming the court of appeals ruling could profoundly limit the availability of damage remedies under Section 1983 and the accountability of local governments for constitutional violations.

STATEMENT OF THE CASE

Petitioner Walter McMillian spent nearly six years on Alabama's Death Row. In 1993, the Alabama Court of Criminal Appeals overturned petitioner's capital murder conviction and death sentence, based on its determination that critical evidence corroborating petitioner's claim of innocence had been withheld by government officials. *McMillian v. State*, 616 So.2d 933 (Ala. Cr. App. 1993). The State subsequently dismissed all charges against petitioner and released him from prison. Pet. App. 1a-2a.

Petitioner brought an action under 42 U.S.C. § 1983 (1994) against Monroe County, Alabama, and various government officials involved in his arrest and incarceration, including Thomas Tate, the Sheriff of Monroe County. Petitioner's action seeks damages for violations of his federal constitutional rights, as well as for violations of state law. Pet. App. 2a.

Petitioner contends that Sheriff Tate is a final policymaker for Monroe County in matters of law enforcement, and that the County therefore is liable for the sheriff's official actions under Section 1983. The district court rejected that contention, relying on the Eleventh Circuit's subsequently-vacated decision in *Swint v. City of Wadley*, 5 F.3d 1435, 1450-1451 (11th Cir. 1993), *vacated sub nom. Swint v. Chambers County Comm'n*, 115 S.Ct. 1203 (1995). Pet. App. 2a.

The court of appeals granted petitioner permission to appeal pursuant to 28 U.S.C. § 1292(b), and held that an Alabama sheriff is not a final county policymaker for purposes of § 1983. The court of appeals acknowledged that the sheriff is elected by county voters, the sheriff's law enforcement operations are funded by the county, and that sheriffs exercise final law enforcement authority within their counties. Pet. App. 4a, 15a-16a & n.5. The court of appeals nevertheless

held that sheriffs are not policymakers for the county in matters of law enforcement. Pet. App. 18a.

The court of appeals based its ruling on the reasoning of its vacated decision in *Swint*. The court concluded that Alabama counties have "no law enforcement authority," because "Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 8a. Moreover, the panel below suggested that, while not dispositive, the Alabama Constitution's designation of sheriffs as members of the state executive department weighs heavily against a finding of county liability under § 1983. Pet. App. 12a-13a.

SUMMARY OF ARGUMENT

In Alabama, the county sheriff functions as the final policymaking authority for the county in matters of law enforcement. Under Alabama law, the county elects the sheriff, pays the sheriff and the sheriff's deputies, finances and equips the sheriff's office, and reviews the sheriff's personnel decisions. No state official reviews the sheriff's policy decisions in matters of law enforcement.

The court of appeals' decision would require that the county commission must possess explicit law enforcement authority before the county sheriff's actions would subject the county to § 1983 liability. Pet. App. 14a-15a. This Court's decisions have rejected the notion that final county policy can be made only by legislative bodies. County policy also can be made by *executive* officials, because the power to establish policy is "no more the exclusive province of the legislature at the local level than at the national and state level." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

ARGUMENT

IN ALABAMA, THE SHERIFF FUNCTIONS AS THE FINAL POLICYMAKING AUTHORITY FOR THE COUNTY IN MATTERS OF LAW ENFORCEMENT.

A county is a "person" within the meaning of 42 U.S.C. § 1983 (1994), and therefore is liable for constitutional violations caused by policies or customs adopted by its lawmakers or by "those whose edicts or acts may fairly be said to represent official policy." *Monell v. Department of Social Servs. of New York*, 436 U.S. 658, 659 (1978). A county may be held liable for a single act or decision of an official with final policymaking authority with respect to the matter in question. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). State law, custom and usage must be examined to determine whether a particular official has final policymaking authority. *Praprotnik*, 485 U.S. at 123.[1]

In this case, the court of appeals incorrectly concluded that an Alabama sheriff is not a final county policymaker in matters of law enforcement. The court of appeals' holding rests on two errors. First, the court failed to address the functional question lying at the heart of the Section 1983 final policymaker doctrine: Whether the sheriff in actuality

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[1] On November 5, 1996, this Court heard oral argument in *Board of County Comm'rs of Bryan County, Oklahoma v. Brown*, No. 95-1100. In *Brown*, the county has stipulated that the sheriff is "the policy maker for [the county] regarding the Sheriff's Department," although it disputes whether the sheriff has "final policymaking authority with respect to employment practices." No. 95-1100 Pet. Br. 19.

functions as a final policymaker for the county and its residents in the area of law enforcement.[2]

Second, the court of appeals assumed without justification that the sheriff's office is distinct from the government of the county. As a consequence, the court incorrectly held that the county cannot be liable under § 1983 for the actions of its sheriff unless the state explicitly has delegated law enforcement authority to county officials other than the sheriff. Pet. App. 8a.

A. Alabama State Law Establishes That The Sheriff Functions As A Policymaker For The County.

The court of appeals relied on a provision of the Alabama Constitution that provides that the executive department of the State includes, in addition to "a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries," "a sheriff for each county." Ala. Const. art. V, § 112. In relying on this provision, the court of appeals overlooked other provisions of Alabama law that designate sheriffs as *county* officials. *See* Ala. Code § 17-2-3 (1996) (providing for the election of a sheriff to a "*County* office[]," along with a "tax assessor and tax collector in each county and one coroner in all counties having a coroner") (emphasis added); *id.* § 36-3-4 (providing that a sheriff, a "*County* officer[]," shall have a four-year elective term of office, as shall "one coroner, members of county commissions, one county treasurer, when elective, and one

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[2] In deciding related immunity issues, the Court has looked to functional and actual duties rather than formal labels. *See, e.g., Forrester v. White*, 484 U.S. 219, 227 (1988) (distinguishing between judicial and non-judicial functions of judges for purposes of judicial immunity under
§ 1983).

constable for each election precinct . . . .") (emphasis added); *id.* § 36-22-16(a) ("Sheriffs of the several counties . . . shall be compensated . . . by an annual salary payable in equal installments out of the county treasury as the salaries of *other county employees* are paid.") (emphasis added). In any event, as the court of appeals recognized (Pet. App. 13a), the label that a State affixes to an official is not dispositive for § 1983 purposes. The dispositive question -- which the court of appeals neither asked nor answered -- is whether the sheriff *functions* as a final policymaker for the county in matters of law enforcement.

1. Alabama could have chosen to enforce the law exclusively at the state level, but it has chosen instead a system of state and county law enforcement.

Alabama could have chosen to enforce the law exclusively through a state police force. Indeed, the Alabama Code expressly empowers the Governor to "establish and maintain a state highway patrol." Ala. Code § 32-2-20 (1996). The Highway Patrol reports to the Department of Public Safety, whose director is appointed by and "serve[s] at the pleasure of the governor." *Id.* § 32-2-1. The Director of Public Safety is in turn responsible for creating and administering the "highway patrol division" of the Department of Public Safety. *Id.* § 32-2-3. The State Director of Public Safety appoints not only the Chief of the Highway Patrol, but "all other employees," *id.* § 32-2-4, including the state troopers who exercise the full powers of police officials throughout the state, *id.* § 32-2-22.

Alabama could have chosen to enforce the law solely through an expanded version of its State Highway Patrol, with officers paid out of the state treasury, *id.* § 32-2-6, insured by the State, *id.* § 32-2-10, and answering directly to state authority. If Alabama had adopted this law enforcement

structure, the highest-ranking state police officer working at the county level would not be considered a final policymaker for the county.

On the other hand, Alabama also could have chosen to delegate all law enforcement authority to its county commissions. In such a law enforcement structure, the county commissions would be directly responsible under state law for raising a police force and enforcing the law within the boundaries of each county.

In fact, Alabama has established a system that clearly differentiates between state law enforcement authority, which is exercised by the State Highway Patrol, and county law enforcement authority, which is exercised by county sheriffs, who are elected and paid by the county. In such a system, the sheriff clearly functions as the final policymaking authority for the county in the area of law enforcement.

2. State law provides that the sheriff is elected, funded, and supported at the county level, and authorized to enforce the law within the county.

In Alabama, the sheriff is "elected in each county by the qualified electors thereof . . . ." Ala. Const. art. V, § 138. County sheriffs are paid directly by the county out of "the county treasury." Ala. Code § 36-22-16 (1996). The Alabama Supreme Court, when considering whether county sheriffs are state officials with respect to the payment of their salaries, concluded they are *county* officials. *Jefferson County v. Dockerty*, 30 So. 2d 474, 477 (Ala. 1947) ("the sheriff of Jefferson County is *undoubtedly a county officer*") (emphasis added); *In re Opinions of Justices*, 143 So. 345, 345 (Ala. 1932) (sheriffs "are, strictly speaking, county officers" covered by a constitutional amendment that requires county

officers to be paid a salary rather than paid out of commissions and fees).[3]

The county commission is responsible not only for paying the sheriff's salary, but also for financing the operation of the county sheriff's office. By law, the county commission must

> furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office.

Id. § 36-22-18. Counties also provide insurance for the sheriffs and their offices. *See, e.g., First Mercury Syndicate v. Franklin County*, 623 So. 2d 1075, 1075 (Ala. 1993) (county purchases professional liability insurance for sheriff).

The sheriff's hiring and other personnel decisions are subject to review by the *County* Personnel Board. *See, e.g., Fields v. State ex rel. Jones*, 534 So. 2d 615, 616-17 (Ala. Civ. App. 1987) (denial of deputy sheriff's medical leave); *Etowah County Personnel Bd. v. McDowell*, 437 So. 2d 563, 563-64 (Ala. Civ. App. 1983) (termination of deputy sheriff for insubordination); *Freeman v. Purvis*, 400 So. 2d 389, 390 (Ala. 1981) (merit bonus increases for sheriff's deputies).

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[3] In *Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991), the Alabama Supreme Court held that a sheriff is a state official for purposes of immunity from suit "based on the [Alabama] constitutional provision [art. V, § 112]," that enumerates sheriffs as part of the state executive department. As noted above, however, when the Alabama Supreme Court has not *presumed* the sheriff's status based on the state constitutional provision, but instead has examined his actual *functions* under state law, the Court several times has deemed the sheriff to be a county officer.

Furthermore, sheriffs and their employees are not part of the state civil service, but rather are part of the unclassified civil service of each county. *See* 1994 Ala. Acts 547. Thus, there is no statute that requires the State to pay damages for torts caused by sheriffs in their official capacities. County commissions pay all the bills of the county sheriff's department and are authorized by statute to cover the sheriff's costs in defending tort suits.

County sheriffs and the law enforcement personnel they direct have no jurisdiction to enforce the law beyond the borders of their respective counties. Alabama law expressly provides that:

> It shall be the duty of sheriffs *in their respective counties*, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties* and to present a report of the evidence so secured to the district attorney or assistant district attorney *for the county*.

Ala. Code § 36-22-3 (1996) (emphasis added). No statute provides sheriffs or their deputies with any general authority to enforce the law outside the county in which the sheriff is elected to serve.

In short, under Alabama law each county elects its sheriff, pays its sheriff and the sheriff's deputies, finances and equips its sheriff's office, and reviews its sheriff's personnel decisions.

The State, on the other hand, neither finances nor supervises the sheriff's policies. No state official, including the Governor and the Attorney General, has the power to appoint any sheriff or control the sheriff's development of law enforcement policy within the county. The only method for "disciplining" a sheriff is by judicial impeachment in the

Alabama Supreme Court, which can be instigated only by suit filed by the Attorney General. Ala. Const. art. VII, § 174.[4] This manner of impeachment for sheriffs is the same as for virtually every county official.[5] Moreover, sheriffs may be impeached only for specified causes that do not include adopting law enforcement policies other than those preferred by the Governor or other state officials.[6]

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[4] Impeachment of a sheriff is "similar to a criminal trial." *Parker v. Amerson*, 519 So. 2d 442, 444 n.1 (Ala. 1987). It differs from the impeachment of the Governor, which requires voting on articles of impeachment by the House of Representatives and a trial by the Senate. Ala. Const. art. VII, § 173.

[5] *See* Ala. Code § 36-11-1(a) (1996):

> The following officers may be impeached and removed from office: judges of circuit and probate courts, district attorneys, judges of the courts of appeals, district judges, sheriffs, clerks of the circuit courts, tax collectors, tax assessors, county treasurers, coroners, notaries public, constables and all other state officers not named in section 173 of the Constitution and all other county officers and mayors and intendants of incorporated cities and towns in this state.

[6] *See* Ala. Code § 36-11-1(b) (1996):

> The officers [listed in § 36-11-1(a)] may be impeached and removed from office for the following causes:
>
> (1) Willful neglect of duty;
>
> (2) Corruption in office;
>
> (3) Incompetency;
>
> (4) Intemperance in the use of intoxicating liquors or narcotics to such an extent in view of the dignity of the office and importance of its duties as unfits the officer for the discharge of such duties; or
>
> (5) Any offense involving moral turpitude while in office or committed under color thereof or connected therewith.

In light of these statutory and judicial mandates, it is plain that, despite the label attached to sheriffs in the Alabama Constitution, the sheriff functions as the final policymaker *for the county* in matters of law enforcement.[7]

3. In Alabama, a county coroner, who is clearly a county official, is statutorily empowered to discharge the duties of the sheriff.

In Alabama, the sheriff's office is analogous to that of the county coroner, except that the Alabama Constitution does not label the county coroner as a member of the State's executive department. A comparison of the offices of the coroner and the sheriff reinforces the conclusion that the sheriff functions as a final county policymaker for purposes of § 1983.

Like the sheriff, the coroner is elected by the qualified voters of the county for a four year term, *see id.* § 11-5-1, and is listed along with the sheriff in certain statutes providing for the election of county officials, *see id.* § 17-2-3 and § 36-3-4. Also like the sheriff, the coroner is empowered under Alabama law to issue subpoenas for witnesses, *id.* § 15-4-3 and § 15-4-4, as well as to issue arrest warrants, *id.* § 15-4-9. The coroner's duties, like the sheriff's, are defined by state law, *see id.* § 11-5-4, and neither the county commission nor any state official has direct authority over the coroner.

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[7] The conclusion that the sheriff is a final policymaker for the county is in accord with the ordinary meaning of the term "sheriff" as "[t]he chief executive and administrative officer of a county, being chosen by popular election." *Black's Law Dictionary* 1376 (6th ed. 1990). *See also American Heritage Dictionary of the English Language* 1663 (3d ed. 1992) (defining "sheriff" as the "chief law enforcement officer . . . in a U.S. county"); *Webster's New International Dictionary of the English Language* 2311 (2d unab. 1954) (defining "sheriff" as the "chief executive officer of a shire or county, charged with the execution of the laws, the serving of judicial writs and processes, and the preservation of the peace").

Thus the question whether the coroner exercises county authority in Alabama is very similar to the question whether the sheriff exercises county authority. Indeed, Alabama statutorily empowers the county coroner *to discharge the duties of the sheriff*, whenever the sheriff's removal, inability to perform his duties, or interest in a matter so requires. *See id.* § 11-5-5.[8] And under Alabama Code § 11-5-12, a coroner who is discharging the duties of the sheriff steps into the sheriff's shoes for purposes of liability.

As elected county executives who exercise statutorily defined authority within the county, the sheriff and the coroner answer to no higher policymaking official at *either* the county or state level of government.[9] The sheriff and the coroner, whether acting as the coroner or as the sheriff, are both final county policymakers for purposes of Section 1983.

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[8] Alabama Code § 11-5-5 reads as follows:

> The coroner must discharge the duties of the sheriff:
>
> (1) When the office of sheriff is vacant and until his successor is qualified;
>
> (2) When the sheriff is incompetent to act;
>
> (3) When the sheriff is imprisoned;
>
> (4) In cases to which the sheriff is a party; and
>
> (5) In such cases as he is directed by the judge of probate.

Under Alabama law the coroner also "shall be keeper of the jail when the sheriff is imprisoned." *Id.* § 11-5-6. *See also id.* § 14-6-2 (providing for the administration of the jail in the event of the "death, resignation, removal from office or expiration of term of office of any sheriff, *or of any coroner acting as sheriff* . . . .") (emphasis added).

[9] In one respect, the office of coroner might be deemed as more nearly answerable to the Governor. The Governor is authorized to fill vacancies in the office of the coroner by appointing a person to serve until a successor is elected and qualified. *See id.* § 11-5-2. The Governor has no authority to appoint sheriffs.

B. The Eleventh Circuit's Ruling Permits States To Evade Section 1983 Liability By Selectively Labeling County Policymakers As State Officials.

Affirmance of the Eleventh Circuit's decision would allow States to shield local governments from Section 1983 liability simply by designating local policymakers as state officers. Alabama's Constitution designates an executive department that consists of officers with statewide jurisdiction, with the sole exception of "a sheriff for each county." If the Court, for this reason, were to hold that sheriffs in Alabama are *not* county officials who exercise law enforcement authority for the county, nothing would prevent Alabama or any other State from amending its designation of state officers to include, for example, "a coroner for each county," a "tax assessor for each county," and a "treasurer for each county."

For that matter, Alabama or any other State could similarly designate as state officials a "mayor for each city," "police chief for each city," and "the county commissioners for each county and the city council members for each city." In so doing, Alabama could insulate its counties and cities from Section 1983 liability for the official acts or decisions of virtually all of its officials.

The court of appeals based its decision primarily on its answer to the "threshold question" whether an Alabama sheriff's actions "fall within an area of the local government's business." Pet. App. 8a. Based on its conclusion that Alabama counties have "no law enforcement authority," and that "Alabama law assigns law enforcement authority to sheriffs but not to counties," the court of appeals held that "a sheriff does not exercise county power when he engages in law enforcement activities and, therefore, is not a final policymaker for the county in the area of law enforcement." *Id.*

The Eleventh Circuit's reasoning reflects an unduly restricted view of local governmental structure that ignores the role of local *executive* officials. In addition to the lawmaking actions of county commissions and similar legislative bodies, county policy also is set by a range of executive officials. The Court has made it abundantly clear that counties are liable not only for the official acts of their lawmakers, but also for acts of "*other* officials 'whose acts or edicts may fairly be said to represent official [county] policy.'" *Pembaur*, 475 U.S. at 480 (emphasis added) (quoting *Monell*, 436 U.S. at 694). *Executive* officials may be final policymaking authorities, because "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level." *Pembaur*, 475 U.S. at 480.[10]

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[10] In its brief opposing certiorari, respondent cites cases holding that Alabama sheriffs are state officials for purposes of the Eleventh Amendment. (Br. in Opp. 25-26, citing, *inter alia*, *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989)). Those cases do not determine the outcome of this case. First, *Parker* expressly states that, "[t]o the extent this claim may be against [a sheriff] as representative of the county," a plaintiff may "sue the county directly" under § 1983. 862 F.2d at 1476 n.4. Second, *Parker* "conducted no analysis of whether the state of Alabama would be liable for judgments entered against county sheriffs but simply assumed that the state would have to pay the claims." *Carr v. City of Florence*, 916 F.2d 1521, 1527 (11th Cir. 1990) (Clark, J., concurring). In fact, counties purchase professional liability insurance for their sheriffs, *see First Mercury Syndicate v. Franklin County*, 623 So. 2d 1075, 1075 (Ala. 1993), and the record in this case suggests that a judgment likely would be paid by the county's self-insurance fund and not by the State. Pet. App. 77a. Third, neither the Governor nor the State legislature has authority to appoint the sheriff or control policymaking in the area of county law enforcement. *Cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (concluding that a school board "is more like a county or city than it is like an arm of the State").

In similar fashion, the court of appeals' ruling would "require[] that [the county] possess power in a particular area" before an official's actions in that area would be attributable to the county. Pet. App. 14a-15a. This amounts to an argument that the county lacks law enforcement authority because the State has never expressly delegated such authority to county *legislators*. But nothing precludes a State from delegating county law enforcement authority exclusively to a county executive officer.

The Eleventh Circuit's approach leads to the implausible conclusion that the sheriff cannot exercise law enforcement authority on behalf of the county unless the county commission is directly involved in law enforcement. This simply cannot be true. In Monroe County, the sheriff decides how to use county resources devoted to law enforcement, subject to the commission's budget decisions, and directs the activities of county employees serving law enforcement functions. Functionally, the sheriff operates as the county's final policymaker in matters of law enforcement.

C. Other Courts of Appeals Have Held Counties Liable For The Official Acts Of County Sheriffs.

Other courts of appeals have found that sheriffs are final county policymakers in the area of law enforcement. The First Circuit, for example, found that a Massachusetts county was liable for a sheriff's Section 1983 violation "because the Sheriff was the county official who was elected by the County's voters to act for them and to exercise the powers created by state law." *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985).

The Fifth Circuit has similarly construed Texas law. A popularly elected sheriff

> hold[s] virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein. . . . [H]is official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.

Turner v. Upton County, 915 F.2d 133, 136 (5th Cir. 1990) (quoting *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (quoting, in turn, *Monell*, 436 U.S. at 694)).

The Sixth Circuit has also held that the county is liable for a sheriff's action, even though the Michigan Constitution explicitly provides that counties do "not make policy for the Sheriff's Department." *Marchese v. Lucas*, 758 F.2d 181, 188 (6th Cir. 1985). In holding the county liable, the court pointed to how Michigan law functions:

> The County, through its Board of Supervisors, appropriates funds and establishes the budget for the Sheriff's Department. The Sheriff is elected by the voters of Wayne County. No doubt he is responsible for enforcing state law and presumably federal law as well. But equally clearly he is not an official of the State of Michigan or of the federal government.

Id. at 189. Courts have thus held counties liable for sheriffs' actions where, as here, counties elect and finance the sheriffs.

Courts also hold counties liable for a sheriff's actions where the sheriff reports to no higher state or county official. The Fifth Circuit found, for example, that an Arkansas sheriff, who has a "statutory duty to perform law enforcement activities in and for the county, is solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers." *Crowder v. Sinyard*, 884 F.2d 804, 828 (5th Cir. 1989) (citation omitted). In these

circumstances, sheriffs are "final policymaking authorit[ies]" and counties are liable for their actions. *Id.* at 829.

In *Davis v. Mason County*, the Ninth Circuit held that a sheriff can be a "final authority" with respect to one policy, even if he or she is not the final authority with respect to other policies. 927 F.2d 1473, 1480-81 (9th Cir. 1991). In Oklahoma, where the sheriff "was responsible for establishing the county's policy regarding the use of force," it was held that the county may be liable for the excessive force used by personnel within the sheriff's office. *Meade v. Grubbs*, 841 F.2d 1512, 1530 (10th Cir. 1988). The Fourth Circuit rejected a county's argument that a sheriff is immune even though state courts have held that sheriffs are state officers. *Dotson v. Chester*, 937 F.2d 920, 926, 927, 932 (4th Cir. 1991) (sheriff is liable under Section 1983 where violation occurred at county-financed jail operated by sheriff even when sheriff is immune for other purposes).[11]

Other than the Eleventh Circuit's decision in *Swint* and the panel's decision below, only one pertinent decision of a court of appeals has declined to find a county liable for the acts of its sheriff. There the court did not consider the functions of the sheriff's office. *Soderbeck v. Burnett County*, 752 F.2d 285, 292 (7th Cir. 1985) (county sheriff held not a

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[11] States attach a variety of constitutional labels to sheriffs. In Texas, Louisiana, and Maryland, elected county sheriffs are part of the state judicial branch. Tex. Const. art. V, § 23; La. Const. art. V, § 27 (for "parish" sheriffs); Md. Const. art. IV, § 44. In Indiana, elected county sheriffs are part of the "administrative" branch. Ind. Const. art. VI, § 2. In other states, such as Kansas, elected county sheriffs are wholly the creation of the legislature, having no constitutional status whatsoever. Kan. Const. art. IX, § 2. These labels are not dispositive for § 1983 purposes. For example, while sheriffs in some states are labeled as part of the judicial branch by their state constitutions, no one could plausibly claim that such a label entitles them to judicial immunity under § 1983.

policymaker where "plaintiff made no effort to show that the sheriff is a policy-making official of the county government"). *See also Soderbeck v. Burnett County*, 821 F.2d 446, 452 (7th Cir. 1987) (refusing to consider such evidence newly offered by the plaintiff because of the "doctrine of the law of the case"). Thus, in *Soderbeck*, the court accepted the county's liability defense because the plaintiff did not introduce any evidence of the sheriff's actual activities.

D. Imposing Liability On Monroe County Is Consistent With The Basis For Municipal Liability Articulated In *Monell*, As Well As With Principles Of County Governance Long Recognized By The Court.

Respondent has argued (Br. in Opp. 25) that holding Monroe County liable for the acts of its elected sheriff would be inconsistent with this Court's decision in *Monell*. According to respondent, the Court in *Monell* based its holding on the fact that municipalities are organized as corporations under state law, and on the recognition that by 1871 corporations (including municipal corporations) generally were treated as "persons" for purposes of statutory analysis. (Br. in Opp. 19 (citing *Monell*, 436 U.S. at 687-89)).

A "corporation," according to respondent, "has a single governing board that controls its operations and either sets its 'policies' or delegates that function to the officers." *Id.* As a consequence, respondent maintains, it is "difficult to imagine how a single corporation could include both a governing board and a separate official [the sheriff] vested with unchecked authority to set corporate policy." *Id.* at 20. Respondent further argues that "Monroe County as a municipal corporation (or the Monroe County Commission as its governing body)," could not possibly have *caused* the constitutional tort, as *Monell* requires, because it never "adopted or ratified a law enforcement policy that caused the

alleged violations of petitioner's constitutional rights." *Id.* at 21.

Respondent's argument reads into *Monell* an unrealistically narrow view of local government, under which final policy is made only by legislative bodies such as county commissions. Yet in both *Monell*, 436 U.S. at 694 (by noting that local officials other than "lawmakers" can make policy), and in *Jett*, 491 U.S. at 737 (by stating that officials other than "governmental bodies" can make policy), the Court rejected the idea that county policy can be made only by county commissions. Many local governments divide final policymaking authority between executive officials and legislative bodies, with executive officials setting final policy in some areas and legislative officials setting final policy in others. If respondent's view were correct, scores of lower court decisions imposing liability on county officials would be wrong.

Monell also states that "municipal corporations" in 1871 were "included within the phrase '*bodies politic* and corporate.'" *Id. at 688* (emphasis added); *see also id.* at 688 n.51 (citing *United States v. Maurice*, 2 Brock. 96, 109 (CC Va. 1823) (Marshall, C. J.) ("The United States is a government, and, consequently, a *body politic* and corporate.") (emphasis added). Sheriffs and other county executive officials derive their authority from the body politic of the county. Not every county policy — just as not every United States government policy — need be adopted or ratified by a legislative body to be final. The Court has never before viewed county governments through such a one-dimensional lens, nor is there reason to begin now.

Under Section 1983, the inquiry this Court has prescribed is one that looks to whether an official's "acts may fairly be said to represent official policy" for the county. *Monell*, 436

U.S. at 694. In this case, it is clear that the sheriff's acts represent law enforcement policy for Monroe County.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 1997

(7)

No. 96-542

In The

Supreme Court of the United States

October Term, 1996

WALTER MCMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE JEFFERSON COUNTY, ALABAMA SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

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BRIEF OF AMICUS CURIAE JEFFERSON COUNTY, ALABAMA SUPPORTING RESPONDENT

Jefferson County, Alabama (hereafter "Jefferson County") respectfully submits its brief *amicus curiae* in support of the respondent. Pursuant to Rule 37(4), this brief may be filed without consent of the parties and without a motion for leave.

INTEREST OF *AMICUS CURIAE*

Jefferson County, in terms of population, is the largest county in Alabama. Jefferson County Sheriff James Woodward employs 570 deputies, the largest number in the State of Alabama. The Jefferson County Commission exercises no statutory control over the law enforcement activities of the Sheriff nor does the Jefferson County Commission exercise any actual control of any kind over the Sheriff's law enforcement activities. The County Commission is merely the source of funding for the Sheriff's operations. Under the Jefferson County personnel merit system established by Alabama Act 248, Regular Session, 1945, the Sheriff is an independent appointing authority with complete control over the hiring and firing of deputies and support personnel. *Wilson v. Bailey*, 934 F.2d 301 (11th Cir. 1991). The Sheriff makes all decisions regarding assignment of duties and responsibilities pertaining to the operation of his department.

On several occasions, the Eleventh Circuit Court of Appeals has affirmed summary judgment or otherwise ruled in favor of Jefferson County, based upon the County's lack of control over the Sheriff and his deputies.

See, e.g., Tittle v. Jefferson County, 10 F.3d 1535 (11th Cir. 1994) (*en banc*); *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992); *Wilson*, 934 F.2d at 301. Implicit in these rulings is a recognition that Jefferson County should not be held liable for the acts or omissions of the Sheriff because it does not control the Sheriff's exercise of discretion in the performance of his law enforcement duties and responsibilities. Indeed, in *Dean*, the Eleventh Circuit held that the Sheriff and his deputies are employees of the State of Alabama. The Court affirmed the principle that the County Commission could not be held liable for the acts or omissions of the Sheriff and his deputies on a respondeat superior liability basis.

If this Court elects to reverse the judgment of the Eleventh Circuit Court of Appeals in the instant case, and impose strict, vicarious liability upon Alabama counties, including Jefferson County, the impact of such a ruling would not only be contrary to this Court's precedent but could devastate Alabama counties' limited fiscal resources.

STATEMENT OF THE CASE

Amicus Jefferson County incorporates and adopts by reference the "Statement of the Case" included in the Respondent's Brief.

SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals properly determined that, under Alabama law, sheriffs are state rather than county policymakers with respect to law enforcement. The analysis used by the Eleventh Circuit to reach this conclusion was inherently sound: how can a sheriff be said to exercise county policy when he is a state officer, acting to enforce state law (Alabama's criminal code), and is in no way answerable to the county's governing body for policy decisions or conduct of his department? Petitioners are not able to penetrate this logic. Instead, they merely point out the fact that Alabama counties fund the sheriff's office, often at levels mandated by state law, and that county voters elect the sheriff (as if to say the voters should have foreseen that they were electing a tortfeasor) and conclude, "If this analysis was good enough for the Sixth Circuit, it should not be questioned."

The reasoning of the Eleventh Circuit in the opinion below is in conflict with the approach taken by the Sixth Circuit in *Pembaur v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984) and, presumably, that is why a writ of certiorari was granted. Because Alabama law has clearly, at least since the Constitution of 1901, established sheriffs to be a constitutional officer of the State, an "arm of the governor . . . to see that the laws are faithfully executed,"[1] who are, pursuant to state statutes, supervised by state judges, there is no basis for finding them to be

[1] *Official Proceedings of the Constitutional Convention of the State of Alabama*, May 21 to September 3, 1901, Vol. I, 882-83.

anything other than state policymakers in the area of law enforcement.

What Petitioners fail to appreciate is that Alabama counties lack "home rule". There is no county law enforcement policy because counties have no law enforcement powers delegated to them by state law. The theory propounded by the Petitioners – hold the county strictly and vicariously liable for all officers who are elected from within the county's boundaries and are funded by the county – is contrary to logic and would bring a host of state officers under the burgeoning umbrella of county liability. Petitioners' theory would also, apart from state law, create new entities capable of incurring liability under 42 U.S.C. § 1983 (i.e., regions made up of two or more counties which "jointly" elect and fund state officers).

The Respondent's "right of control" paradigm presents a far more logical and practical way of distinguishing between state and county policymakers for purposes of constitutional tort liability. The governmental entity which is able to extend, limit, abolish, or otherwise control the power of a certain officer should be liable for the consequences of that officer's conduct or policies. Alabama counties *should* be liable if their commission or county road engineer (appointed by the commission) approves a racially discriminatory policy with respect to the hiring of county road workers. However, the county should not be liable when it could do *nothing* to prevent or correct misconduct of a particular state officer, like the sheriff. To hold otherwise is to impose strict vicarious liability on the counties in violation of the causation requirement expressed in 42 U.S.C. § 1983 and by this

Court in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Court of Appeals for the Eleventh Circuit should be affirmed.

ARGUMENT

I. ALABAMA LAW UNEQUIVOCALLY ESTABLISHES LOCAL SHERIFFS TO BE *STATE* OFFICIALS UNDER *STATE* CONTROL WHEN THEY PERFORM LAW ENFORCEMENT FUNCTIONS.

All parties agree that the question of whether local officials are final policymakers for a particular governmental entity is to be determined by looking to state law. *See* Petitioners' Brief at 10; Respondent's Brief in Opp'n to Pet. for a Writ of Cert. at 5 (*quoting Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion)). *See also City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737-38 (1989) (plurality opinion). Consequently, the question before the Court is whether the court of appeals below properly interpreted Alabama law on the matter of whether sheriffs are exercising final county policymaking authority when they enforce the state's criminal law. If any state's laws have "sp[oken] with perfect clarity" to this question, it is Alabama's. *See Praprotnik*, 485 U.S. at 125-126 ("We are not, of course, predicting that state law will always speak with perfect clarity [on this issue].").

A. Alabama's Constitution of 1901, besides designating sheriffs as members of the state's executive department, centralized control over sheriffs with the state.

Alabama's current constitution, the Constitution of 1901, describes sheriffs as members of the executive department of the State of Alabama. See at appendix Ala. Const. of 1901 art. V, § 112. Delegates at the Constitutional Convention of 1901 expressed their concerns about the then-current state of the law (prior to 1901), which held sheriffs accountable *only* to local constituencies.

> Sheriffs are elected by the people of a county. They are not elected by the people of the state at large, and they are only state officers in the sense that they are part of the executive. They are not responsible to the chief executive of the state, but they are responsible to the people who elected them. Under the law as it now is [prior to the Constitution of 1901] . . . [if] they fail to perform the duty imposed upon them by law, . . . the enforcement of that law and their removal from office is placed in the hands of the courts of the *county* in which they serve.

Official Proceedings of the Constitutional Convention of the State of Alabama, May 21 to September 3, 1901, Vol. I, 878 (1940) (emphasis added) (hereafter "*Official Proceedings*"). This lack of centralized state control had, at least to the thinking of the 1901 constitutional convention attendees, allowed sheriffs to ignore, without accountability, various acts of mob violence and vigilantism including lynchings. *See Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987); *Official Proceedings*, at 879 ("So long as the Sheriff can with impunity turn over his prisoner to a mob and let

them take him and do as they will with him and *only be answerable to the people of his county* where the crime is committed, . . . lynch-law will prevail in the State of Alabama.")

In an effort to combat this disturbing trend of violence, former Alabama governor Thomas G. Jones proposed significant changes in the way sheriffs could be removed from office for neglect of duty. The practical effect of these enactments were that, "sheriffs were made more accountable to the supreme executive officer of the state, the Governor. . . . and the [Alabama] Supreme Court [obtained] original jurisdiction to hear impeachment proceedings against sheriffs." *Parker*, 519 So. 2d at 444. *See* Ala. Const. of 1901 art. V, § 138, App. at 2; Ala. Const. of 1901 art. VII, § 174, App. at 4; Ala. Const. of 1901 amend. No. 35, App. at 5. The grounds for impeachment of the sheriff were also expanded to include his failure to prevent harm being done to those within his custody. *See* Ala. Const. of 1901 art. V, § 138 ("Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievance bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under § 174 of this Constitution.")

The convention delegates viewed the power to originate impeachment actions against sheriffs to be a vital weapon in the governor's arsenal, without which he could not insure the faithful execution of state law.

> We have already passed upon the question as to whether the governor of Alabama shall be charged in this Constitution with seeing that the laws of this State are faithfully executed, and we

have already by an article which has been passed upon by this Convention declared that it shall be the duty of the governor to see that the laws of the State are executed. The governor is an executive officer. *Each sheriff is an arm of the governor and it is only through the sheriff that the governor can see that the laws are faithfully executed in each county although the sheriff represents the executive in the county where he is elected and where he perform[s] his duties.* As we have charged the governor in the Constitution with seeing that the laws are faithfully executed, it would seem that it would be proper also in the very same Constitution to have a provision whereby he may have some authority to act, and whereby he can require the executive officer in each county to perform his duty and to faithfully execute the law.

Official Proceedings, at 882-83.

The 1901 Constitution also vested the governor with the power to "require information in writing, under oath, from the officers of the executive department [which includes sheriffs] . . . relating to the duties of their respective offices. . . . " Ala. Const. art. V, § 121 (1901), App. at 1. The giving of a false report by a member of the executive department to the governor was elevated into an impeachable offense by the 1901 Constitution. *See* Ala. Const. art. VII, §§ 173, 174, 175 (1901), App. at 3-5. *Cf.* Ala. Const. art. V, § 9 (1875) (False report to governor was the equivalent of perjury which could only be heard in local courts.).

B. Alabama's statutory framework further strengthens the sheriffs ties with the state.

State law places sheriffs under the supervision of state circuit judges. Ala. Code § 12-17-24 mandates that "[t]he presiding circuit judge shall exercise a general supervision of the judges, clerks, registers, court reporters, bailiffs, *sheriffs* and other court employees of the circuit and district courts within the circuit, except employees for the clerk, and see that they attend strictly to the prompt, diligent discharge of their duties." Ala. Code § 12-17-24 (1975) (emphasis added). This supervision is not one in which "a presiding judge can direct and usurp the functions and duties of the named officials." *Resolute Insurance Co. v. Ervin*, 234 So. 2d 867, 870 (1970). Rather, the judge's supervisory power extends only to ensure "that officials promptly and diligently discharge their duties." *Id.*

Additionally, pursuant to statutory enactments, the minimum training requirements of sheriff's department employees are established by the *state* rather than the county[2] and are supervised by a state agency. *See* Ala. Code § 36-21-46 (1975).[3] Likewise, though compensation for sheriffs and their deputies is taken out of the county

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[2] In contrast, Alabama county commissions have no "authority to hire, fire, train . . . [or] assign deputy sheriffs." *Sanders v. Miller*, 837 F. Supp. 7106, 7110 (N.D. Ala. 1992); *see Carr v. City of Florence*, 916 F.2d 1521, 1525-26 (11th Cir. 1990); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989).

[3] *Cf. Davis v. Mason County*, 927 F.2d 1473, 1481 (9th Cir. 1991). As one ground for holding the county liable for acts of sheriff's deputies, the Ninth Circuit found that the state merit law did *not* cover the training of sheriff's deputies.

treasury, *state law* establishes their rate of compensation. Ala. Code §§ 36-21-16, 36-21-10 (1975).

C. County governments in Alabama are, by design, very limited in function and exercise no law enforcement authority.

Alabama counties are powerless to control the sheriffs, their deputies, or their law enforcement policies. In fact, as this Court recently stated, the primary function of the counties' governing body, the county commission, is to oversee county road construction and repair. *Presley v. Etowah County Comm.*, 502 U.S. 491 (1992) (Kennedy, J.) (holding that routine decisions of Alabama county commissions with respect to road management do not implicate the Voting Rights Act of 1965). Alabama counties, through their commissions or otherwise, are severely constricted in their influence and are "authorized to do only those things permitted or directed by the legislature of Alabama." *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984).

In *Lockridge*, Alabama's intermediate level appellate court rebuffed one county's attempt to bring personnel of the sheriff's department under county control. The court found that no authority existed for the commission "to promulgate work rules for the employees of the sheriff's office, especially the sheriff's deputies. In the absence of such authority, [the court was] constrained to hold that the Etowah County Commission has no power to grant leaves of absence to the sheriff's deputies. The sheriff is the only official who has such authority." 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984).

Although *Lockridge* did not involve the type of law enforcement policies involved in the instant case the holding certainly illustrates the relative powerlessness of Alabama counties with respect to the sheriff. Alabama counties have no inherent "police powers", are unable to enact criminal codes, and must rely exclusively upon the state and its agents for law enforcement.

The only link between the county commission and the sheriff the Petitioners are able to point out is fiscal. According to state law, the sheriff's salary comes out of county funds and the county is obligated to provide the sheriff's department with quarters, office supplies, equipment, and automobiles. Ala. Code §§ 36-22-16, 36-22-18 (1975 & Supp. 1991). However, the mere fact that counties provide a portion of the sheriff's department's fiscal needs, as mandated by *state law*, is not the equivalent of county control over law enforcement. First, the county does not have "unfettered discretion" over the granting or denial of the sheriff's reasonable budgetary requests. *See Etowah County Commission v. Hayes*, 569 So. 2d 397, 399 (Ala. 1990); *Morgan County Comm'n v. Powell*, 293 So. 2d 830 (Ala. 1974). In other words, a county commission could not legally give the sheriff the ultimatum: either reform your policies or we will refuse to fund the hiring of new deputies or the purchase of new squad cars. Additionally, sheriffs are partially funded from sources wholly outside of county authority, such as proceeds from drug-related forfeitures and fees from pistol permits.

D. The extent of state control over county sheriffs is well-illustrated in Jefferson County.

Jefferson County, like the other sixty-six counties in Alabama, has no day-to-day control over the sheriff and his deputies, nor does it have the ability to set salaries, make provisions for retirement benefits or hire chief deputies and assistants. Every aspect of the sheriff's office is controlled and regulated by the state, not the county. For example, the release of certain prisoners, 1951 Ala. Acts 94, and the disposal of contraband by purchasing agents, 1969 Ala. Acts 522, which are very specific to Jefferson County's sheriff's department, are mandated or regulated pursuant to state law. These acts exemplify the county's lack of control over the most minuscule decisions affecting the sheriff's department.

Even where the county commission has some discretion over assignment of offices in the Courthouse or quarters for elected officials, the Alabama Supreme Court has made a special exception for the Sheriff. *See Orange v. Bailey*, 548 So. 2d 424 (Ala. 1989) (holding county did not have discretion to assign Sheriff to quarters other than those located in the courthouse). If the County cannot even tell the Sheriff where his offices will be, how can it be said to control his law enforcement activities.

The county commission also has no control over the salaries, fees or allowances to sheriffs, deputies or their assistants; rather, the state legislature provides for such. Compensation and appointment of the Assistant Sheriff of the Bessemer Division of the Jefferson County Sheriff's Department, compensation for the Executive Assistant to the Sheriff of Jefferson County, and the Chief Deputy of

Jefferson County, are all mandated by the state, with no county participation. 1988 Ala. Acts 88-937 (1st Special Sess.); 1987 Ala. Acts 87-790; 1988 Ala. Acts 88-851 (1st Special Sess.). Fees for the service of summons, and deputies witness fees, as well as the regulation of fees, and the determination of pistol permit fees, which provide a large amount of money to the Sheriff outside of that amount allotted to him by the county, are all legislated by the state, not the county. 1973 Ala. Acts 331; 1964 Ala. Acts 102; 1965 Ala. Acts 513; 1975 Ala. Acts 369. The state also determines the sheriff's expense allowance, and the deputies subsistence allowance. 1989 Ala. Acts 89-791, 1988 Ala. Acts 88-897 (1st Special Sess.).

E. The state law authority cited by the Petitioners does not establish that sheriffs are county policymakers.

The Petitioners' cite several cases in support of their argument that "Alabama law and the Alabama courts frequently have expressed the common understanding of the sheriff as a county-based official setting policy for the county." Petitioners' Brief at 14. However, none of the cited cases stand for that proposition. Rather, petitioner cites dicta in these opinions in an effort to mislead the Court.

Jefferson County v. Dockerty, 30 So. 2d 474 (Ala. 1947), while describing the sheriff of Jefferson County to be a county officer, merely did so for the purpose of identifying officers who were to pay fees, cost and commissions into the county treasury pursuant to Ala. Code, Title 62, § 139 (1940). *Dockerty*, 30 So. 2d at 477 ("the sheriff of

Jefferson County is undoubtedly a county officer *within the meaning of section 139*") (emphasis added).

In *In re Opinions of Justices*, 143 So. 345 (Ala. 1932), the Alabama Supreme Court, in the context of discussing the regulation of fees, salaries and allowances paid by the county under the Second Amendment to the Constitution of 1901, held that "the officeholders there mentioned," which included the sheriff, "are county officers *within the meaning of Amendment 2 to the Constitution of 1901.*" *Id.* (emphasis added). Nowhere does the court discuss the issue of "county-based official[s] setting policy for the county." Petitioners' Brief at 14.

In *State, ex rel. Attorney General v. Pratt*, 68 So. 255 (Ala. 1915), a case involving the impeachment of a judge, the only mention of a sheriff was in the court's review of an earlier case regarding the impeachment of a sheriff. Although the *Pratt* court stated that a sheriff was "the highest purely executive officer of a county," *Id.* at 257, this statement is certainly not dispositive on the issue of sheriffs acting as policymakers for the county. Similar statements have been made in regard to other officers whose jurisdiction is limited to the county, yet who are clearly *state* officers. For example, Alabama District Attorneys have been defined as "the foremost representative[s] of the executive branch of government in the enforcement of the criminal law in [their] county." *Dickerson v. State*, 414 So. 2d 998, 1008 (Ala. Crim. App. 1982). However, there is no dispute over the fact that District Attorneys are officers of the state falling within the purview of the executive branch of government. *Id.*; *see Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So. 2d 907 (Ala. 1992).

Finally, *First Mercury Syndicate, Inc. v. Franklin*, 623 So. 2d 1075 (Ala. 1993) makes no mention whatsoever of policymaking officials for the county. Presumably, the Petitioners cite *Franklin* because the county paid for the sheriff's insurance. However, the fact that one county[4] decides to provide insurance for its sheriff adds nothing to the argument that all sheriffs are final county policymakers with respect to law enforcement.

It is revealing that Petitioner failed to mention in its brief the numerous decisions of the Alabama Supreme Court which hold that § 112, Alabama Constitution, means exactly what it says; an Alabama sheriff is an executive officer of the State of Alabama. He is *not* an agent, officer or employee of the County. *Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987); *Oliver v. Townsend*, 534 So. 2d 1038 (Ala. 1988). In *Parker*, the Alabama Supreme Court held:

> [a] sheriff is not an employee of the county for purposes of imposing liability on the county under a theory of respondeat superior.

519 So. 2d at 442.

Moreover, in *King v. Colbert County*, 620 So. 2d 623 (Ala. 1993), the Alabama Supreme Court considered the relationship between the county and the sheriff with respect to the jail and concluded that:

> [t]he sheriff's authority over the jail is *totally independent* of the Colbert County Commission.

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[4] Jefferson County provides no insurance for the sheriff nor does Jefferson County pay any judgments entered against the sheriff.

620 So. 2d at 625 (emphasis added). The Alabama Supreme Court has also held that deputy sheriffs are the agents of the sheriff, *not* county employees. *Whitten v. Lowe*, 677 So. 2d 778 (Ala. 1995); *Hereford v. Jefferson County*, 586 So. 2d 209 (Ala. 1991); *White v. Burchfield*, 582 So. 2d 1085 (Ala. 1991); *Mosley v. Kennedy*, 245 Ala. 448 (1944).

II. THE SIXTH CIRCUIT'S CONCLUSIONS AS TO THE STATUS OF SHERIFFS UNDER OHIO LAW IN *PEMBAUR* DOES NOT CONTROL EITHER THE ELEVENTH CIRCUIT'S OR THIS COURT'S ANALYSIS OF SHERIFFS UNDER ALABAMA LAW.

A. This Court, in reversing the Sixth Circuit in *Pembaur*, did not review the Sixth Circuit's determination as to whether Ohio sheriffs were county policymakers but merely deferred to the court of appeals' interpretation of state law.

Petitioners contend that this Court's holding in *Pembaur v. Cincinnati* controls the question in the instant case. However, that is not the case. Instead, this Court in *Pembaur* refused to delve into the minutiae of Ohio state law and re-examine the Sixth Circuit's basis for holding Ohio counties liable for the misconduct of sheriffs and prosecutors. Instead, the Court merely accepted the Sixth Circuit's determination as being the "definitiv[e] constru[ction] . . . " of Ohio law and proceeded to analyze the county's liability under § 1983, taking the Sixth Circuit's determination as a given. 475 U.S. at 491. (O'Connor, J., concurring). Justice Brennan, in writing for the majority, consistently referred to the description of Ohio sheriffs as

final county policymakers as being the Sixth Circuit's conclusion, and not the conclusion of this Court.

> Based upon *its* examination of Ohio law, the *Court of Appeals* found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement.

475 U.S. at 476 (citation omitted) (emphasis added); *see also* 475 U.S. at 484. ("[T]he *Court of Appeals* concluded, based upon *its* examination of Ohio law . . . ") (emphasis added). Because the Sixth Circuit's determination on the issue of final policymaking authority necessarily arises out of state law, 475 U.S. 483, this Court, as is its practice in matters involving state law, afforded the determination "great deference." 475 U.S. 484 n. 13 (*citing United States v. S.A. Empressa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 815, n. 12 (1984); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) (citing cases); *Bishop v. Wood*, 426 U.S. 341, 345-347 (1976)). Deference to the courts of appeals' expertise in handling state law questions with respect to policymaking authority also is evident in *Jett v. Dallas Indep. School Dist.*, 491 U.S. at 738. ("We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the defendant] possessed final policymaking authority. . . . ").

B. If the Sixth Circuit in *Pembaur* had analyzed Ohio sheriffs under the "right to control" paradigm propounded by the Respondent, arguably, the result would not have changed: Ohio law does in fact give county governments significant control over sheriffs.

Although Ohio sheriffs, like their Alabama counterparts, are elected by county electors and look to county government for fiscal support, there are significant distinctions. In contrast to Alabama sheriffs who hold a reporting duty to the governor and are supervised by state circuit judges, *see supra*, Ohio sheriffs are required to make certain reports directly to the Ohio county governmental units. Ohio Rev. Code Ann. § 311.16 (Anderson 1988). While Alabama laws direct sheriffs' vacancies to be filled by the governor, Ohio county commissions have the power to fill vacancies in the sheriff's office. *See State ex rel. Grace v. Bd. of Elections of Franklin County*, 78 N.E.2d 38 (Ohio 1948).

III. REQUIRING A SUBSTANTIVE "RIGHT TO CONTROL" BEFORE IMPOSING COUNTY LIABILITY IS SUPERIOR TO THE "ORIGIN OF SALARY/ GEOGRAPHIC JURISDICTION" LITMUS TEST PROPOSED BY PETITIONERS.

Although this Court made it clear in *Pembaur*, *Praprotnik*, and *Jett*, that the determination as to whether a particular local official was a policymaker for a particular governmental body was to be based exclusively on an examination of state law, this Court has nowhere articulated exactly what a lower court should look for in its examination of state law. In that sense, the Court in this

case is facing a "blank slate" upon which it can draft guiding principles which federal courts can use in their examination of state law. Evidently, this was the very reason a writ of certiorari was granted. The circuit courts of appeals have attempted to formulate the guiding principles of state law but were unable to come to a consensus; two divergent (and arguably, mutually exclusive) conclusions were reached. The Sixth Circuit's decision in *Pembaur* emphasized electoral base (county voters elect the sheriff) and fiscal support (county pays sheriff's department's salaries and pays for equipment) to find the sheriff as a county policymaker. The Eleventh Circuit, in the instant case, looked to more substantive issues, such as from where does the sheriff's law enforcement authority emanate (state government) and which governmental entity has the ability to control the sheriff and his policies (state government). The Petitioners argue, probably correctly, that the Sixth Circuit's "origin of fiscal support/ electoral base" analysis favors their position while the Respondents emphasize the logic and practicality of the Eleventh Circuit's "right to control" model. Rarely does the Court face such clearly defined and well-articulated mutually exclusive alternatives. *Amicus curiae* Jefferson County, for the reasons stated below, finds the reasoning behind the "right to control" option far superior to the Sixth Circuit's analysis.

A. Applying the Petitioners' proposed test for determining whether particular officials are county or state policymakers to other Alabama officials illustrates the test's impracticality.

The Petitioners do not propose a workable standard or "bright line" for determining whether certain officers are final policymakers for the state or for the county. In Alabama many officials who are undoubtedly state officials are elected exclusively by county electors, are provided offices in the county courthouse, and receive at least a portion of their salary from the county. Adopting the Petitioners' "origin of salary/geographic jurisdiction" test would bring a host of such officials under the umbrella of county liability even though they have no contact with the county and cannot be controlled by the county.

1. District Attorneys.

In Alabama, district attorneys are constitutional state officers of the executive branch, "the foremost representative of the executive branch of government in the enforcement of criminal law in [their] county."[5] *Dickerson v. State*, 414 So. 2d 998, 1008 (Ala. Crim. App. 1982); *see also Hooks v. Hitt*, 539 So. 2d 157, 159 (Ala. 1988) (district attorney and all in his employ are employees of state). Yet, in at

[5] *Compare* this description of district attorneys from *Dickerson* with the Petitioners' description of Alabama sheriffs: "Within the county, the sheriff is the chief law enforcement officer. . . . " Pet'r Brief at p. 18.

least 23 of Alabama's 67 counties,[6] district attorneys are elected exclusively by electors from a single county. Ala. Const. amend. 328, § 6.20; Ala. Code § 12-11-2 (1975). Although their primary salary comes from the state, district attorneys may receive supplements to their salaries from the county. Ala. Code § 12-17-220(d) (1975). Furthermore, district attorneys operate from an expense account known as the District Attorney's Fund, which is held by the county treasury. Ala. Code § 12-17-197 (1975). Like the sheriff, the county must also provide the District Attorney with an office, as well as a courtroom, and may also provide the District Attorney with "additional court supportive personnel, services, equipment, and furnishings." Ala. R.J. Admin. 3(A). "In the event the courthouse is inadequate to supply office rooms for such officer [as the District Attorney], the county commission may lease such office rooms in a convenient location in the county site *and pay rental from the county fund*." Ala. Code § 11-3-11(a)(1) (1975) (emphasis added). Applying the Petitioners' simplistic litmus test would produce absurd results: the district attorneys from the twenty-three single county judicial districts would arguably be county policymakers while district attorneys in the remaining seventeen judicial circuits (covering forty-four counties) would be state policymakers, or some sort of multi-county regional policymakers – with no substantive characteristics distinguishing the two.

[6] In the other 44 counties, district attorneys like circuit judges are elected to multi-county judicial districts made up of two to five counties. *Ala. Code*, § 12-11-2 (1975).

2. Circuit and district judges and circuit clerks.

Similarly, categorizing Alabama circuit judges and district judges as either state or county policymakers would be problematic under the Petitioners' suggested analysis. Both are considered members of the state's judicial branch. Ala. Const. amend. 328, § 6.01. However, both circuit and district court judges are elected by the electors within the boundaries of their judicial circuits or districts. Ala. Const. art. VI, amend. 328, § 6.13. Again, in twenty-three counties, the judicial circuit consists of a single county. *See supra*. Both circuit and district judges are paid by the state, Ala. Code §§ 12-17-30 (1975) (circuit court judge's salary) & 12-17-68 (1975) (district court judge's salary), but may receive a supplement paid from county funds. Ala. Code §§ 12-17-30, 12-17-68 (1975). Judges are also provided with courtrooms and offices in the county courthouse at the expense of the county commission. See Ala. Code, §§ 11-14-9, 11-14-10, 11-12-13 (1975).

Similarly, circuit court clerks (hereafter "clerks") are elected for six-year terms by the electors of each county, and vacancies are filled by the circuit court judge with jurisdiction over the county where the clerk's office is located. Ala. Const. art. VI, amend. 328, § 6.20(b). Clerks are paid by the State, Ala. Code § 12-17-80 (1975) (employees in the clerk's office have been paid by the State since October, 1977, and prior to that time by the county), and may receive local supplements pursuant to general or local act. Ala. Code § 12-17-81 (1975). Alabama Code § 12-18-92 (1975) authorizes counties to "pay a

circuit clerk a supplemental salary from the general fund of such county." The office of the circuit clerk is located in the courthouse of the county. Ala. Code § 12-17-90 (1975).

3. Members of the County Boards of Education.

The county board of education is comprised of five members elected by the electors of the county. Ala. Code § 16-8-1(a) (1975). Board members are compensated a set amount for a maximum number of days per year from the public school funds of the county. Ala. Code § 16-8-5 (1975); *see* Ala. Code § 16-1-26 (1975) (county board members may be compensated at a higher rate pursuant to a local act and approval by a majority vote of the board). The "general administration and supervision of the public schools . . . of each county . . . shall be vested in the county board of education." Ala. Code § 16-8-8 (1975); *see Hutt v. Etowah County Bd. of Educ.*, 454 So. 2d 973 (Ala. 1984) (County boards are "charged by the legislature with the task of supervising public education within the counties"). "The county board[s] of education [are] by and large the governing body of the county [educational] system. . . . " *Panther Oil and Grease Mfg. Co. v. Blount County Bd. of Educ.*, 134 So. 2d 220, 223 (1961). Despite the fact that county boards of education solely govern such matters in the county, they are local agencies of the state and are, therefore, immune from suit. *Belcher v. Jefferson County Bd. of Educ.*, 474 So. 2d 1063 (Ala. 1985); *Hutt*, 454 So. 2d at 973 (striking down the plaintiff's contention that "a county school board, like a county commission, is nothing more than an involuntary political subdivision of

a county, and, therefore, subject to suit."); *see also Enterprise City Bd. of Educ. v. Miller*, 348 So. 2d 782, 783 (Ala. 1977); *Simms v. Etowah County Bd. of Educ.*, 337 So. 2d 1310, 1316 (Ala. 1976).

B. The Respondents' "right to control" standard represents a more logical and practical approach and is consistent with tort liability theory.

The superiority of the Respondents' "right to control" analysis is evident in an examination of, not only Alabama sheriffs, but also the other local officials discussed above. Sheriffs, district attorneys, judges, and judicial clerks cannot set county policy because the county has no policy in the enforcement or administration of criminal or civil actions. These officers are empowered to enforce or implement state law by the state's constitution or through state statutory enactments. Just as certainly as the state can expand or abolish each office, it can, by legislative pronouncement, restrain the officers' conduct. On the other hand, the county commission could pass a stack of resolutions purporting to establish policy for the particular officer which would have no legally binding effect; the resolutions could be ignored with impunity. Nor does the fiscal relationship between the county commission and these officers provide any real control. The county is mandated by state law to provide the budgetary support described above.

Counties and their representative bodies, the county commissions, should only be held liable for the policies or conduct of officials under their control. Certainly, if the

county commission or its road engineer condoned racially discriminatory policies in the distribution of road building or maintenance resources, the county could be held liable. *See Presley v. Etowah County Comm.*, 502 U.S. 491 (1992) (opining that although county commission's road decisions did not implicate the Voting Rights Act, discriminatory policies could be "actionable under a different remedial scheme.").

If the tripartite goals of 42 U.S.C. § 1983, similar to general tort law, is to compensate the victim of constitutional deprivations, punish the wrongdoer, and deter future conduct, the Petitioners' test will only "succeed" on the first count. Making counties liable for the misconduct of state officers the county cannot control will certainly add another "deep pocket" to the list of defendants. However, holding counties liable for the wrongdoing of actors outside of their control does nothing to punish the wrongdoer or deter future misconduct. Individual capacity suits for damages against the sheriff,[7] coupled with injunctive relief leveled against the state (the sheriff in his official capacity), accomplishes all three goals while leaving the Alabama county commissions free to supervise matters within their legislative prerogative (i.e, road construction) and allowing the state to supervise the officers which enforce its criminal code.

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[7] *See Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992).

CONCLUSION

Amicus Curiae, Jefferson County, Alabama, respectfully requests that this Court affirm the holding of the Court of Appeals of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

CONSTITUTION OF THE UNITED STATES

[Amendment XI]

[*Restriction of Judicial Power*]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ALA. CONST. of 1901 art. V, § 112

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.

ALA. CONST. of 1901 art. V, § 121

The governor may require information in writing, under oath, from the officers of the executive department, named in this article, or created by statute, on any subject, relating to the duties of their respective offices, and he may at any time require information in writing, under oath, from all officers and managers of state institutions, upon any subject relating to the condition, management

and expenses of their respective offices and institutions. Any such officer or manager who makes a willfully false report or fails without sufficient excuse to make the required report on demand, is guilty of an impeachable offense.

ALA. CONST. of 1901 art. V, § 138

A sheriff shall be elected in each county by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and he shall be ineligible to such office as his own successor; provided, that the terms of all sheriffs expiring in the year nineteen hundred and four are hereby extended until the time of the expiration of the terms of the other executive officers of this state in the year nineteen hundred and seven, unless sooner removed. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

ALA. CONST. of 1901 art. VII, § 173

The governor, lieutenant-governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and justices of the supreme court may be removed from office for willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith, by the senate sitting as a court of impeachment, under oath or affirmation, on articles or charges preferred by the house of representatives. When the governor or lieutenant-governor is impeached, the chief justice, or if he be absent or disqualified, then one of the associate justices of the supreme court, to be selected by it, shall preside over the senate when sitting as a court of impeachment. If at any time when the legislature is not in session, a majority of all the members elected to the house of representatives shall certify in writing to the secretary of state their desire to meet to consider the impeachment of the governor, lieutenant-governor, or other officer administering the office of governor, it shall be the duty of the secretary of state immediately to notify the speaker of the house, who shall, within ten days after receipt of such notice, summon the members of the house, by publication in some newspaper published at the capitol, to assemble at the capitol on a day to be fixed by the speaker, not later than fifteen days after the receipt of the notice to him from the secretary of state, to consider the impeachment

of the governor, lieutenant-governor, or other officer administering the office of governor. If the house of representatives prefer articles of impeachment, the speaker of the house shall forthwith notify the lieutenant-governor, unless he be the officer impeached, in which event he shall notify the secretary of state, who shall summon, in the manner herein above provided for, the members of the senate to assemble at the capitol on a day to be named in said summons, not later than ten days after receipt of the notice from the speaker of the house, for the purpose of organizing as a court of impeachment. The senate, when thus organized, shall hear and try such articles of impeachment against the governor, lieutenant-governor, or other officer administering the office of governor, as may be preferred by the house of representatives.

ALA. CONST. of 1901 art. VII, § 174

The chancellors, judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs, may be removed from office for any of the causes specified in the preceding section or elsewhere in this Constitution, by the supreme court, under such regulations as may be prescribed by law. The legislature may provide for the impeachment or removal of other officers than those named in this article.

ALA. CONST. of 1901 art. VII, § 175

The clerks of the circuit courts, or courts of like jurisdiction, and of criminal courts, tax collectors, tax assessors, county treasurers, county superintendents of education, judges of inferior courts created under authority of section 168 of this Constitution, coroners, justices of the peace, notaries public, constables, and all other county officers, mayors, intendants, and all other officers of incorporated cities and towns in this state, may be removed from office for any of the causes specified in section 173 of this Constitution, by the circuit or other courts of like jurisdiction or a criminal court of the county in which such officers hold their office, under such regulations as may be prescribed by law; provided, that the right of trial by jury and appeal in such cases shall be secured.

ALA. CONST. of 1901 amend. No. 35 (amending art. V, § 138)

A sheriff shall be elected in each county by the qualified electors thereof who shall hold office for a term of four years, unless sooner removed, and he shall be eligible to such office as his own successor. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grevious [grievous] bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff

may be impeached, under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

ALA. CONST. of 1901 amend. No. 328, § 6.20

(a) A district attorney for each judicial circuit shall be elected by the qualified electors of those counties in such circuit. Such district attorney shall be licensed to practice law in this state and shall, at the time of his election and during his continuance in office, reside in his circuit. His term of office shall be for six years and he shall receive such compensation as provided by law. Vacancies in the office of district attorney and in his staff shall be filled as provided by law.

Record No. 96-542

In The Supreme Court of the United States

October Term 1996

WALTER McMILLIAN,
Petitioner,

v.

MONROE COUNTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AS *AMICUS CURIAE*

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18 pp

QUESTIONS PRESENTED

1. Whether a county sheriff is a final policymaker for his/her county in law enforcement matters for purposes of county constitutional tort liability under 42 U.S.C. 1983 where the sheriff is the ultimate authority for county law enforcement policy?

    A) Whether the acts and edicts of a county sheriff performing traditional law enforcement functions represents official county policy where the county sheriff's department is the exclusive provider of law enforcement services within the county?

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BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AS *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The Southern States Police Benevolent Association (hereafter SSPBA) is a non-profit association comprised of over twenty thousand law enforcement officers and related public employees in ten southern states including Alabama. SSPBA and its various state affiliates engage in various types of advocacy, lobbying, litigation and scientific analyses of various law enforcement issues. SSPBA promotes improved law enforcement and constitutional protection for everyone.

SSPBA and its members are vitally interested in the grave constitutional issues before this Court. Law enforcement officers are frequently victims of constitutional torts, often in the employment context. In the experience of SSPBA, counties are pervasively involved in the constitutional torts committed by their sheriffs. SSPBA has litigated a number of cases involving similar issues of county liability for the constitutional torts of a sheriff. SSPBA accordingly submits this brief to assist this Court in its resolution of this important case.[1]

STATEMENT OF THE CASE

Amici adopt the Statement of the Case and Facts as presented by Petitioner.

SUMMARY OF ARGUMENT

Sheriffs are typically the final repository of law enforcement policy for counties throughout America. The acts and edicts of a county sheriff performing traditional law enforcement functions in a county where the sheriff's department is the exclusive provider of law enforcement services represents the official policy of that county.

The overwhelming weight of substantially settled circuit court authority holds that counties may be liable for constitutional torts of its sheriff whenever the sheriff is performing a traditional law enforcement function. Accordingly, this Court should reverse the Eleventh Circuit below, and adopt the approach taken in *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991) and similar cases. The decision below is an aberration and is inconsistent with this Court's decisions in

[1] The parties have consented to the filing of this brief amicus curiae. Letters indicating their consent will be filed with the Clerk of Court.

Monell v. Dept. of Social Services, 436 U.S. 658 (1978), *Pembaur v. City of Cinncinnati*, 475 U.S. 469 (1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

The decision of the Eleventh Circuit below represents a severe restriction upon the rights of victims to challenge improper law enforcement tactics necessitating constitutional tort liability against counties. Without counties as party defendants, traditionally responsible tortfeasors will be allowed to escape responsibility and victims will be deprived of appropriate compensation and justice.

I. INTRODUCTION: THE TRADITIONAL ROLE OF SHERIFFS AND COUNTIES

When a sheriff or his deputy commits an actionable constitutional tort while acting in their official capacity, the determinative question arises of who is responsible and ultimately liable. Since sheriffs are governmental actors, they act under color of authority vested in them by their state and local law. Sheriffs are typically held to be **county**, rather than state officials. In most states, undoubtedly Sheriffs are county officials. See *Harter v. C.D. Vernon*, 101 F.3d 334, 340-42 (4th Cir. 1996), citing *Hull v. Oldham*, 104 N.C. App. 29, 41, 407 S.E.2d 611, 618 (N.C. App. 1991). As the Fourth Circuit held in *Harter*: "It has long been understood that a sheriff is a 'law enforcement officer of the county.'" 101 F.3d 341, quoting *Southern Railway v. Mecklenburg County*, 231 N.C. 148, 56 S.E.2d 438, 440 (N.C. 1949). In *Southern Railway*, the North Carolina Supreme Court explained:

> "[o]ne of the primary duties of the county, acting through its public officers, is to secure the public safety by enforcing the law ... This

> is an indispensable function of county government ... The sheriff is the chief law enforcement officer of the county."

Harter observed: "**Sheriffs have been considered county officers since the creation of that office in England.**" (emphasis added). 101 F.3d 341.

Since sheriffs and their deputies are frequently shielded from personal and individual liability by the doctrine of qualified immunity, and because many sheriffs and their deputies are effectively judgment proof in their individual capacities, the only real and effective remedy for a constitutional tort by the sheriff is the County. Since a judgment against a public official in an official capacity suit is tantamount to a judgment against the governmental entity, *Brandon v. Holt*, 469 U.S. 464 (1985), the decision of the court below could leave victims of official misconduct without an effective remedy.

Under Respondent's view of section 1983 jurisprudence, no entity of government would be financially responsible for the acts of the County sheriff in his official capacity in the performance of law enforcement functions. Such a result is untenable and is inconsistent with this Court's history of affording remedies where important federal rights are contravened.

In most jurisdictions, state law frames the parameters of responsibility for various government functions and overlapping responsibilities among sheriffs and counties.[2] Counties

[2] For example, see the North Carolina system, which is set out in a state constitutional and statutory scheme appear in scattered sections of the General Statutes. See N.C.G.S. 153A-101 (Board of County Commissioners directs fiscal policy for county), 153A-1-3 (regulating employment practices of sheriffs and counties over deputy sheriffs); chapter 162 which provides numerous sections regulating the sheriff in various areas; N.C.G.S. 162-22 (providing that the sheriff must "have the care and custody of the jail in his county."

frequently enact local ordinances to further delineate the responsibilities between the sheriff and the county. This structure typically creates layers of both state and local law, enacted to serve local conditions and customs, that form the framework of rights and responsibilities of sheriffs and county governments. Unfortunately, state and local legislation often do not adequately delineate responsibilities sufficiently clear so that one can readily allocate liability.[3] Often, there are shared obligations which results in shared responsibility and liability. Even where the county is not a direct participant in the conduct giving rise to the complaint, under this Court's teachings in *Pembaur* and other cases, the county is responsible for the conduct of its final policymakers whoever they may be.

Throughout America, sheriffs are typically final policymakers in county law enforcement matters. In most American jurisdictions, traditional sheriffs and their departments provide law enforcement within their county. Unless there is some other county organized police, sheriffs traditionally provide the exclusive law enforcement function for the entire county. When county sheriffs provide the **exclusive** countywide law enforcement services, such sheriffs undoubtedly constitute the final county policymaker for law enforcement matters.

Sheriffs' Departments are supported by their sponsoring counties in numerous and varied ways. See *Harter v. C.D. Vernon,* 101 F.3d 334 (4th Cir. 1996) Counties typically have statutory responsibilities to provide law enforcement, both directly and indirectly. Counties typically provide law enforce-

[3] Consequently, there has been substantial litigation of these issues, much of which has to be on a case by case basis in order to properly apply both state and local law to determine who is the final policymaker in a given area. See e.g., *Reid v. Johnston County*, 688 F. Supp. 200, 202 (E.D.N.C. 1988), aff'd, 878 F.2d 430 (4th Cir. 1989)(explaining how the North Carolina statute makes clear that the responsibility for county confinement rests with the county.)

ment through their own sheriff, although, metropolitan and other areas also sometimes employ police agencies.[4] Counties typically provide the backbone of their sheriff's departments - financially, by hiring personnel, by performing various other personnel functions, by purchasing police equipment, by affording training, by providing law enforcement facilities, among other things. Counties typically have the responsibility of providing a local jail, which are traditionally managed by the sheriff. *See Dotson v. Chester; Heflin v. Stewart County*, 958 F.2d 709, 716-17 (6th Cir. 1992)(section 1983 claim against county for inmate's medical needs valid because sheriff was the sole policymaker for the conduct of jail officials). Consequently, in every material respect, sheriffs are the final policymaking authority for law enforcement purposes within the County especially where the sheriff's department is the exclusive provider of law enforcement services.[5]

These and other compelling circuit court authorities afford substantial history and solid precedent for Petitioner's position. These cases are consistent with this Court's teachings in *Monnel*, *Pembaur*, *Praprotnik* and their progeny, which should not be disturbed. The overwhelming weight of circuit court authority is consistent with *Dotson*, therefore generally making

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[4] Where there is an additional countywide law enforcement agency that has jurisdiction, the sheriff may not necessarily be the final policymaking authority. One would have to examine the delegation of authority to the other countywide law enforcement agency, and contrast that with the authority afforded the sheriff, in order to ascertain section 1983 liability.

[5] See, e.g., *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991); *Brooks v. George County*, 84 F.3d 157, 165 (5th Cir. 1996); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992); *Bennet v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996); *Turner v. Upton County*, 915 F.2d 133, 136-37 (5th Cir. 1990); *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); *Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986); *Marchese v. Lucas*, 758 F.2d 181 (6th Cir. 1985).

counties liable for the constitutional torts of their sheriffs.

The Eleventh Circuit decision below is an aberration and a retreat from this Court's precedents. The *Monnel* doctrine has worked well in governing section 1983 claims against counties and sheriffs. Respondents, nor the Eleventh Circuit below, have offered any justification for such a retreat from this Court's traditional constitutional protection.

II. DECISIONS OF FINAL POLICYMAKING OFFICIALS IN LAW ENFORCEMENT ARE IMPUTABLE TO THE GOVERNMENTAL ENTITY

Governmental liability arises from a deprivation of federal rights caused by any official with final policymaking authority. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). This Court has made clear that the question of "whether a particular official has 'final policymaking authority' is a question of *state* law." *Praprotnik*, 485 U.S. at 124. In assessing this question, Justice O'Connor explained how "state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Id.* at 124.[6] In law enforcement at the local level, it is the county sheriff.

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[6] As explained by the Fourth Circuit in *Dotson v. Chester*, 937 F.2d at 924, "state and local laws" must be "searched" ... to determine "whether the actions of a county sheriff represent final policymaking authority for the county, thereby creating county liability." *Dotson* explained that "our exploration passes through case law, the county code, state statutes, and state regulations." 937 F.2d at 295.

III. *DOTSON V. CHESTER* COMPELS COUNTY LIABILITY FOR CONSTITUTIONAL TORTS OF SHERIFFS PERFORMING TRADITIONAL LAW ENFORCEMENT FUNCTIONS

In *Dotson*, the Fourth Circuit held that the actions of a Sheriff constituted the final policymaking authority of the County, therefore subjecting the County to liability for the Sheriff's conduct. The court also held that the Sheriff wielded county, as opposed to state, authority. *Dotson* involved an examination of state law and the particular symbiotic relationship between the sheriff and county.[7] Accord *Revene v. Charles County Commissioners*, 882 F.2d 870, 874 (4th Cir. 1989)(Sheriff's Department is an agency of County government).

The Fourth Circuit's conclusion in *Dotson* heavily relied upon *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989), which held the county liable for the sheriff's employment decisions because the sheriff possessed the "ultimate county authority" with respect to personnel decisions. *Parker* reasoned that "[t]he county need not exercise direct control over the sheriff with respect to the sheriff's hiring decisions in order to be liable under section 1983 for damages caused by those decisions." *Id.* at 1479-80.

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[7] *Dotson* recounted analysis from a number of leading cases dealing with the issue of holding counties liable for the conduct of Sheriffs. See cases cited at 937 F.2d at 925 - 932, especially *Turner v. Union County*, 915 F.2d 133 (5th Cir. 1990)("County liability under section 1983 must attach ... when the official representing the ultimate repository of power in county makes a deliberate decision..."); *Zook v. Brown*, 865 F.2d 887, 895 (7th Cir. 1989)(sheriff responsible for employee discipline therefore County liable for Sheriff's conduct). See *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981)(sheriff's conduct chargeable to county).

In *Flood v. Hardy*, 868 F. Supp. 809, 812 - 13 (E.D.N.C. 1994), the court treated this issue and rejected the arguments asserted by Respondents below:

> This particular issue has been litigated in the Fourth Circuit Court of Appeals in *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991), and in this Court in *Brewington v. Bedsole and Cumberland County*, No. 91-120-CIV-3-H (1993, Howard, J., and Dixon, M.J.). Both cases found that liability could be attributed under the rule set out in *Monnell v. Department*, 436 U.S. 658, 690 [other cites omitted] (1978). That rule establishes that an entity, such as a county, can be held liable if a person has been deprived of rights due to an official policy. [citations omitted]. Official government policy can be established not only by the formal policymaking actions of the lawmakers, but also by the actions of officials with final policymaking authority. [citations omitted]. The Sheriff is such an official, as indicated in N.C. Gen. Stat. section 153A-103(1), which gives the sheriff exclusive control over supervision of employees in his office...
>
> In North Carolina, where the Sheriff is given exclusive control over the supervision of his employees including deputies and jailers, the Sheriff may bind the County by his actions....

In *Flood*, a deputy sheriff was alleged to have engaged in improper law enforcement conduct by improperly "dumping" an inmate at a hospital without following required law enforcement standards of care. Consequently, the inmate died after wandering off from the hospital. The sheriff was en-

gaged in traditional law enforcement functions that sheriffs have historically performed.

Flood has been relied upon by leading national treatises as being representative of the rule in attributing law enforcement conduct of County Sheriff's Departments to counties under section 1983. See Pratt & Schwartz, *Section 1983 Civil Rights Litigation*, Volume 2 at 27 (1995) citing and analyzing *Flood*.

IV. SHERIFFS ARE FINAL COUNTY POLICYMAKERS FOR EMPLOYMENT FUNCTIONS WITHIN COUNTY SHERIFF'S DEPARTMENTS

In addition to holding counties liable for the constitutional torts of sheriffs in law enforcement functions, county liability is applicable in other contexts. A plethora of authorities have consistently held that Sheriffs are generally held to be county policymakers for purposes of employment terminations of deputy sheriffs.[8] The scenario in *Lucas v. O'Loughlin*, 831 F.2d 232, 235 (11th Cir. 1987) presents an

[8] E.g., *Bouman v. Block*, 940 F.2d 1211, 1231 (9th Cir. 1991)(delegation by County to Sheriff of final policymaking authority for employment matters renders County liable); *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991)(sheriff had final authority for training of deputies); *Maarchese v. Lucas*, 758 F.2d 181 (6th Cir. 1985)(sheriff is law enforcement arm of county and therefore makes final policy for county); *Crowder v. Sinyard* 854 F.2d 804, 828-29 (5th Cir. 1989)(sheriff as county policymaker); *Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986) (sheriff as final policymaker for county); *Anderson v. Gutschenritter*, 836 F.2d 346 (7th Cir. 1988). Police agencies typically have delegated employment decisionmaking authority to the Sheriff or police department, therefore making the governmental entity liable for the decisions of the sheriff or chief. E.g., *Larez v. Los Angeles*, 946 F.2d 630 (9th Cir. 1991)

appropriate analytical framework for addressing these troubling section 1983 issues. There, the court reasoned:

> Although elected by virtue of state law, he [the sheriff] was elected to serve the County as Sheriff. In that capacity, he has absolute authority over the appointment and control of his deputies. His and their salaries were paid by local taxation and according to a budget approved by the county commissioners.

Lucas consequently held that the sheriff was the final policymaker with respect to employment of deputies, therefore rendering the County liable for the Sheriff's conduct.

In *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992), the Eighth Circuit similarly grappled with the issue of whether a county could be liable for the actions of a sheriff in discharging a deputy for free speech. There, the trial court rendered a verdict on behalf of the plaintiff deputy against the Sheriff and the County. The deputy had communicated by letter to a judge supporting a criminal defendant on a sentencing matter. The letter angered the Sheriff, who dismissed the deputy. The court held:

> [Sheriff] Poskochil's broad discretion to set policy as the County's elected Sheriff, and the County Attorney's testimony that [Sheriff] Poskochil had exclusive authority to fire [Deputy] Buzek, adequately support the jury's determination that [Sheriff] Poskochil possessed the discretionary, policymaking authority necessary to hold the county liable for this decision. 972 F.2d at 996.

CONCLUSION

WHEREFORE, for the reasons stated herein and in Petitioner's brief, this Court should reverse the decision below. This Court should adopt the approach taken in *Dotson v. Chester* and other circuit courts.

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Record No. 96-542

In The Supreme Court of the United States

October Term 1996

WALTER McMILLIAN,
Petitioner,

v.

MONROE COUNTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE THE BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AS *AMICUS CURIAE* OUT OF TIME

J. Michael McGuinness*
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**Counsel of Record*

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Now comes the Southern States Police Benevolent Association and respectfully moves this court for leave to file its *Amicus Curiae* brief out of time.

Amicus has already filed its brief in this case by consent, which were mailed on January 21, 1997 and received in this court's clerk's office on January 23, 1997. At the time of preparation and filing of its brief, counsel for *Amicus* was unaware of this court's order of December 6, 1996, mandating that the briefs shall be due and filed at this court by January 21, 1997. Counsel for *Amicus* had merely been put on notice on January 21 as being the filing date, and acted accordingly by mailing them that date. All counsel were served and there would be no prejudice as a result of the two day delay in actual filing.

Wherefore, the Southern States Police Benevolent Association respectfully requests that this court issue an order granting leave for the untimely filing of the *Amicus Curiae* brief.

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No. 96-542

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WALTER MCMILLIAN,
Petitioner,
v.
MONROE COUNTY, ALABAMA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37 pp

QUESTION PRESENTED

Whether a county government is liable under § 1983 for a sheriff's law enforcement decisions, where state law does not vest law enforcement authority in the county government and makes the sheriff a state officer.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compelling interest in legal issues that affect state and local governments.

One of the essential attributes of state sovereignty is the prerogative to decide how to allocate governmental authority. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). As the Court noted in *Gregory*, "[t]hrough the structure of its government, and the character of those

who exercise government authority, a State defines itself as sovereign." *Id.* Among the most fundamental decisions a State makes are those regarding whether to vest a particular governmental authority (such as law enforcement) in an entity of local government or in state officials.

While the Court has held that a local government is suable as a "person" under 42 U.S.C. § 1983, even today most counties do not have general home rule powers but serve as administrative arms of their States with only limited authority and revenue raising powers. The members of the Forty-Second Congress were aware of this fact and expressly rejected the imposition of liability on a local government where the State has not granted it authority to act.

The court of appeals' decision correctly recognized that as a prerequisite to holding Monroe County liable for its sheriff's "policymaking," it must first determine whether Alabama has vested law enforcement authority in county governments. After an extensive review of state law, it concluded that Alabama has not done so and that Alabama's sheriffs are executive officers of the State. *See* Pet. App. 3a-19a. This holding is entitled to great deference. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 & n.13 (1986).

County governments frequently have limited fiscal resources. The adoption of petitioner's criteria for imposing liability thus has potentially grave consequences for counties and their ability to provide essential services to their citizens. While petitioner would have this Court disregard the State's sovereign choice in allocating governmental authority, Congress rejected petitioner's liability regime in enacting § 1983. Accordingly, *amici* submit this brief to assist the Court in its resolution of this case.[1]

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. A local government is suable as a "person" under § 1983 only to the extent the entity exercises powers granted to it by the State. In *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), the Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), and held that local governments are suable as "persons" under § 1983. In doing so, the Court relied principally on the common law understanding that the corporation was an artificial person and the Dictionary Act's rule of construction that "the word 'person' may extend and be applied to bodies politic and corporate." *See Monell*, 436 U.S. at 687-88 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). The common law understanding recognized, however, that corporations possessed only those powers conferred on them by their charters. As the Court noted in *Railroad Co. v. Harris*, 79 U.S. (12 Wall.) 65, 81 (1870), "[t]he chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter."

This principle applied as well to municipal corporations. *See* John F. Dillon, *Treatise On The Law Of Municipal Corporations* § 9, at 29 (1872). As a general rule, municipal corporations were not liable when their officers acted "outside of the powers of the corporation." *Id.* § 767, at 725. As the Court has recognized, the members of the Forty-Second Congress, which enacted § 1983, were well versed in the common law and "likely intended [its] principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

This construction of the term "person" is likewise supported by the debate which culminated in the House of Representatives' rejection of the Sherman Amendment. Numerous representatives recognized that the Amendment, which proposed to provide a cause of action against local

governments for failing to prevent riots and mobs acting with the intent to deprive citizens of their civil rights, was patently unfair because many local governments had not been granted the authority under state law to keep the peace. *See generally* Cong. Globe, 42d Cong., 1st Sess., 791-95 (1871). As the members of the Forty-Second Congress recognized, States are not required to vest law enforcement authority in county governments. Whether they have done so is a question which must be answered before determining whether a particular official is a county's final policymaker.

As this Court has noted, one of the main powers of Alabama county governments "is to supervise and control the maintenance, repair, and construction of the county roads." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 493-94 (1992). Alabama counties' other principal powers are largely limited to erection of county courthouses, jails, hospitals and other necessary county buildings. *See* Ala. Code § 11-14-10. As the court of appeals recognized, "Monroe County has no law enforcement authority." Pet. App. 18a. It thus properly held that Monroe County was not liable under § 1983 for the sheriff's law enforcement decisions.

2. In challenging the court of appeals' holding that Monroe County could not be held liable for the sheriff's decisions because it does not have law enforcement authority, petitioner argues that it is the common understanding that sheriffs exercise county power and thus make county policy when they engage in the enforcement of state law. Contrary to petitioner's suggestion, the sheriff, when acting as a conservator of the peace, has always been viewed as exercising "the sovereignty of the State." 1 Walter H. Anderson, *A Treatise On The Law Of Sheriffs, Coroners And Constables* § 6, at 5 (1941). Sheriffs were frequently constitutional officers of the State and remain so today in several States, including Alabama. *See, e.g.*, Ala. Const. art. V, § 112; La. Const. art. V, § 27. Sheriffs were commonly subject to removal from office through

either the State's impeachment procedure or removal by the governor or both. Alabama follows this tradition by making its sheriffs members of the State's executive department and subjecting them to impeachment proceedings initiated by the Governor and adjudicated by the state Supreme Court. *See* Ala. Const. art. V, § 112; art. VII, § 174.

None of the criteria which petitioner and his *amici* rely upon to argue that the sheriff exercises county authority, *e.g.*, the method of selection, funding, and absence of any county official who reviews the sheriff's decisions, alters the status of Alabama's sheriffs as constitutional officers of the State who, in enforcing state law, exercise state authority. At the time of § 1983's enactment, it was "the usual practice . . . for the people of the several counties to elect sheriffs at regular intervals." 2 *Bouvier's Law Dictionary* 518 (1868). Nonetheless, it was the common understanding then, as now, that the sheriff, as conservator of the peace, exercises the sovereign's authority. Likewise, the requirement that the county fund the sheriff's office does not alter this settled understanding. Traditionally, the sheriff was not financially supported by the sovereign but was still understood as exercising sovereign authority. Moreover, sheriffs are commonly assigned numerous duties, such as serving court process and subpoenas issued by state agencies and legislatures. *See, e.g.*, Ala. Code § 36-22-3(1). Adopting petitioner's view would result in the imposition of liability on the county for a sheriff's unconstitutional service of a state-issued subpoena even though the county has no authority with respect to such matters.

Finally, that Monroe County's board of commissioners does not have authority to review the sheriff's law enforcement decisions does not prove that the latter makes county policy. To the contrary, the absence of such authority is entirely consistent with the State's related decisions not to grant counties law enforcement authority

and to make sheriffs constitutional officers of the State's executive department.[2]

ARGUMENT

A SHERIFF IS NOT A COUNTY POLICYMAKER FOR LAW ENFORCEMENT PURPOSES WHERE STATE LAW DOES NOT GRANT THE COUNTY LAW ENFORCEMENT AUTHORITY AND MAKES THE SHERIFF A STATE OFFICER

In *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), this Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), to the extent it had held that local governments were not suable as "persons" under 42 U.S.C. § 1983. The Court, however, rejected the view that § 1983 imposes *respondeat superior* liability, holding that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." 436 U.S. at 694. After considering § 1983's text and legislative history, the Court concluded that "Congress did not intend [local governments] to be held liable unless action pursuant to official [local government] policy of some nature caused a constitutional tort." *Id.* at 691. As the Court stated, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

As explained below, the court of appeals properly recognized that in determining whether Monroe County could be held liable under § 1983 for Sheriff Tate's acts, a court must initially ask the "threshold question" of "whether the official is going about the local government's business. If the official's actions do not fall within an area of the local government's business, then the official's

[2] *Amici* note that as state officers, sheriffs are suable under § 1983 in their individual capacities, as was done here. *See Kentucky v. Graham*, 473 U.S. 159 (1985); *see also* Pet. App. 2a.

actions are not acts of the local government." Pet. App. 8a. The court of appeals' holding that § 1983 liability does not attach because "Sheriff Tate is not a final policymaker for Monroe County in the area of law enforcement, [because] Monroe County has no law enforcement authority," *id.* at 18a, is manifestly correct as a matter of statutory construction.

Petitioner asserts that "the county commission or the other parts of the county's government, [cannot] be distinguished from the county sheriff." Pet. Br. 11. Yet the Forty-Second Congress expressly rejected the very form of liability which petitioner urges this Court to impose—liability on the corporate entity of a local government where a State has not granted it authority to act, notwithstanding that the State has also created the office of a sheriff who is elected and funded by local residents. While sheriffs have frequently been called county officers, their duties involve the exercise of a wide variety of functions, many of which involve the exercise of state rather than county authority. Alabama merely follows the settled understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority. Where, as here, sheriffs exercise state authority, their acts cannot "fairly be said to represent" a local government's official policy so as to establish "that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. The Court should therefore reject petitioner's attempt to impose on Monroe County and its citizens the vicarious liability which the Court rejected in *Monell*.

A. A Local Government Cannot Be Sued Under § 1983 For Unconstitutional Policies When It Has No Authority To Make Such Policies

1. Section 1983 renders liable "[e]very person who, under color of [state law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. The court of appeals held that

Monroe County was not suable under § 1983 because in the absence of the State having granted law enforcement authority to the County, the Sheriff could not be deemed to be "exercis[ing] county power." Pet. App. 16a. This holding is manifestly correct as a matter of statutory construction.

In concluding that § 1983's use of the term "person" included municipal corporations and local governments, the *Monell* Court relied principally on the common law understanding of the nature of the corporation and the Dictionary Act's rule of construction that "the word 'person' may extend and be applied to bodies politic and corporate." *See Monell*, 436 U.S. at 687-88 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). But while by 1871, the corporation was treated as a natural person and citizen of a State for the purposes of establishing the diversity jurisdiction of the federal courts, *see id.* (citations omitted), the corporation was always recognized as being an artificial person with only those powers which were conferred on it by its charter. *See, e.g., Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). Consistent with this understanding, the Court noted shortly before the enactment of § 1983:

> A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; *the latter can do only what is authorized by its charter.*

Railroad Co. v. Harris, 79 U.S. (12 Wall.) 65, 81 (1870) (emphasis added); *see also Fertilizing Co. v. Hyde Park*, 97 U.S. (7 Otto) 659, 666-67 (1878) ("powers and immunities" of artificial person "depend primarily upon the law of its creation").

At the time of § 1983's enactment, it was likewise settled that municipal corporations "possess no powers or

faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them." John F. Dillon, *Treatise On The Law Of Municipal Corporations* § 9, at 29 (1872). As Judge Dillon explained:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words;* second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.

Id. § 55, at 101-02. *See also* Howard S. Abbott, *A Summary Of The Law Of Public Corporations* § 21, at 20-21 (1908) (A public corporation "takes nothing by its charter but what is plainly and unequivocally granted. This is especially true of all those powers, the exercise of which, if liberally considered, might lead to the placing of illegal, unjust or burdensome obligations upon the taxpayers of the community.").[8]

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[8] A corollary of this principle is the *ultra vires* doctrine, which was also well established at the time of Section 1983's enactment. As Judge Dillon wrote in 1872:

> The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts outside of the powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgment of the courts.

Dillon, *The Law Of Municipal Corporations* § 767, at 725. *See also* 1 Charles F. Beach, Jr., *Commentaries On The Law Of Public Corporations* § 592, at 607-08 (1893) ("Acts of municipal corporations which are done without power expressly granted, or fairly to be implied from the powers granted or incident to the purposes of their creation, are *ultra vires*.").

Today it is still the general rule that "in order to render a municipal corporation liable, the acts complained of must have been

As the Court has recognized, the members of the Forty-Second Congress were well versed in the common law and "likely intended [its] principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *see also Heck v. Humphrey*, 512 U.S. 477, 483-86 (1994); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989) (collecting cases). The Court has likewise noted that § 1983 "is to be read 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" *Burns v. Reed*, 500 U.S. 478, 484 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). These principles demonstrate that under § 1983, a local government acts as a "person" only to the extent its putative officers and agents exercise powers which the State has granted to it. A local government is thus suable as a "person" under § 1983 only to the extent the entity exercises powers granted to it by the State.

This construction of the term "person" is also supported by the Forty-Second Congress' endorsement of the common law principles applicable to municipal corporations in rejecting the conference committee's draft of the Sherman Amendment.[4] As the Court noted in *Monell*, the

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in the exercise of some power conferred on it by its charter or other positive enactment." 18 Eugene McQuillin, *The Law Of Municipal Corporations* § 53.60, at 379 (Stephen M. Flanagan ed., 3d ed. 1984). Likewise, with respect to the torts of a municipal corporation's officers, it "is well settled that if the alleged tort is in connection with an act which is wholly ultra vires, i.e., beyond the scope of the power of the municipality, no liability for damages arises, as against the municipality." *Id.*

[4] The conference committee's draft of the Sherman Amendment provided a cause of action against local governments to persons injured by

> any persons riotously and tumultuously assembled together . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude . . . .

Monell, 436 U.S. at 703 (quoting Cong. Globe, 42d Cong., 1st Sess. 749, 755 (1871)). This version not only rendered local governments liable but provided the injured person with collection remedies such as attachment, garnishment and mandamus against the local government itself. *Id.* at 703-04 (quoting Cong. Globe at 749, 755). The debate focused on this version, which was added in conference after "[t]he House refused to acquiesce in a number of amendments made by the Senate, including the [original] Sherman amendment" to H.R. 320. *Id.* at 666.

Sherman Amendment—which proposed to provide a cause of action against local governments to persons injured in either their person or property by rioters or mobs acting with the intent to deprive them of their civil rights—was the subject of vigorous debate in the House of Representatives which rejected it. *See* 436 U.S. at 666-69; *see also Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 727 (1989) ("[o]pposition to the amendment . . . was vehement, and ran across party lines, extending to many" legislators who had voted for Section 1983).

The principal objection to the Amendment was that it imposed liability on local governments for failing to keep the peace even though local governments frequently had not been granted the authority to keep the peace under state law. *See Monell*, 436 U.S. at 673. Numerous lawmakers noted this infirmity in the legislation during the floor debate in the House. For example, Representative Willard stated:

> In most of the States—it is so in mine, I know—the counties and the towns have no power whatever in this regard except as those powers have been conferred upon them by the State; and these powers can be taken from them at any time by the State. If these powers are not given to them by the State, or if they hold them only at the will of the State, what justice is there in making the town, city, or parish liable for not protecting the property of the citizens, when perhaps no laws for its protection exist; for not giving me protection when they have

> not been clothed by the State with the right and power to give me protection?

Cong. Globe, 42d Cong., 1st Sess. 791 (1871). *See also id.* at 794 (statement of Representative Poland) (counties are "[i]n a sense . . . corporations, but with only such powers and subject to such burdens as the State may deem advisable").

Representative Blair, to whom the Court in *Monell* attributed the most complete statement of opposition, *see* 436 U.S. at 673, added:

> [The Sherman Amendment] claims the power in the General Government to go into the States . . . and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. Now, sir, that is an exceedingly wide and sweeping power. I am unable to find a proper foundation for it. . . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot . . . tell me where its power will stop and what obligations it might not lay upon a municipality. . . . The State has made these municipalities for certain objects. It has not made them for the purpose of meeting this obligation which the Government of the United States under this bill would seek to interpose and lay upon them . . . .

Id. at 795. And of particular relevance in assessing petitioner's contention that Monroe County should be held liable for the sheriff's actions notwithstanding that the State has not granted it law enforcement authority, are the comments of Representative Burchard:

> . . . there is no duty imposed by the Constitution of the United States, or usually by State laws, upon

> a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. . . . But counties are organized, at least in most of the States, for the management of the financial affairs of the counties. The county commissioners, county court, board of supervisors, or other body acting for the county, have power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county, or justices of the peace and constables in the subdivisions of the counties and towns, &c. But still in few, if any, States is there a statute conferring this power upon the counties. Hence it seems to me that these provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance.

Id.

As the foregoing demonstrates, the members of the Forty-Second Congress were well aware of the common law principle that counties, like cities and towns, possess only the authority which the State has vested in them. Section 1983 must be construed with this principle in mind. The subsequent rejection of the Sherman Amendment—on the ground that the Federal Government could not impose an obligation on local governments where the States themselves had not vested such authority in the local government entity—renders unassailable the conclusion that absent a grant of authority from the State to engage in a particular function, a county does not make policy so as to subject it to *Monell* liability. Put another

way, a local government is a "person" only with respect to those powers which the State has vested in it.[5]

[5] This construction of the term "person" is also supported by the common law principles applicable to the suability of county governments that derive from their historical origins as administrative arms of state governments. Unlike municipal corporations, created with the consent of their inhabitants, counties were created by the State without the consent of their citizenry and thus were considered to be "involuntary quasi corporations." Dillon, *Treatise On The Law Of Municipal Corporations* § 10, at 31 n.1. As such they were viewed as being "purely auxiliaries of the state." *Id.* at 32-33. As Judge Dillon added, "to the general statutes of the state [counties] owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject." *Id.* at 33.

Counties were not suable in the same manner as municipal corporations. As Judge Dillon wrote:

> [M]any of the courts have drawn a marked line of distinction between municipal corporations and *quasi* corporations, [with] respect to their liability, to persons injured by their neglect of duty: holding the former liable, without an express statute giving the action, in cases in which the latter are not considered liable unless made so by express legislative enactment.

Id. See also id. at 31-32 n.1 (quoting *Hamilton County v. Mighels*, 7 Ohio St. 109, 118-24 (1857)).

Professor Cooley likewise explained that counties were not "persons" in the same manner as municipal corporations:

> The municipal corporation is the only representative of the strict and complete public corporation; it is represented in our cities, boroughs, towns, and villages, whether incorporated under general or special laws. As intimated above counties . . . are not municipal corporations, but only quasi corporations, with limited statutory powers and liabilities, and not subject to the doctrines of law peculiarly applicable to municipal corporations.

Roger W. Cooley, *Handbook Of The Law Of Municipal Corporations* § 5, at 14 (1914). *See also* Abbott, *A Summary Of The Law Of Public Corporations* § 530, at 529 ("Since the government of a quasi corporation is ordinarily imposed by the sovereign, its business and private relations simple[,] and further, because it performs solely governmental duties, the universal rule obtains that no liability exists in respect to the performance of its duties and obligations unless one is expressly imposed by statute.") (footnote omitted); *Soper v. Henry County*, 26 Iowa. 264, 268, 270 (1868); *Hedges v. County of Madison*, 6 Ill. (1 Gilm.) 567, 570 (1844).

To subject local governments, and in particular counties, to liability for functions over which they have no authority would have potentially ruinous consequences. Even today, approximately ninety-five percent of U.S. counties are general law counties which serve as administrative arms of their State with limited powers. *See* Tanis J. Salant, *County Governments: An Overview* in Advisory Commission on Intergovernmental Relations, *Intergovernmental Perspective* at 6 (Winter 1991).[6] With respect to such counties, the States retain authority to impose on them obligations to fund the performance of state functions without necessarily granting the county authority to perform the function.[7] As Justice O'Connor's opinion in *City of St. Louis v. Praprotnik* noted:

> The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies.

485 U.S. 112, 124-25 (1988) (plurality opinion).

The States are not required by either the U.S. Constitution or Section 1983 to vest law enforcement authority in county governments. Whether they have done so is a question which, as the court of appeals recognized, must necessarily be resolved before answering the question of

[6] Even though home rule provisions have been enacted in thirty-six States, as of 1991 only 117 of 1,307 eligible counties had adopted general home rule. Salant at 6.

[7] One of the traditional functions performed by county governments is to provide courts, which are commonly presided over by county elected judges. *See* U.S. Advisory Commission on Intergovernmental Relations, *Profile Of County Government* 30 (1971). It cannot be contended that the judges of such courts are exercising county authority because the county is required to provide and maintain a courthouse. Rather, they exercise state authority even where they are elected by county residents.

whether a particular official is a county's final policymaker. *See* Pet. App. 7a-8a. It is likewise a question of state law on which, as this Court has expressly held, the courts of appeals should receive considerable deference. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). *Cf. Jett*, 491 U.S. at 738; *id.* at 738 (Scalia, J., concurring).

Here, the answer is clear. Alabama has not granted counties home rule powers but rather only narrow and defined authority. *See* Ala. Code §§ 11-3-10, 11-3-11 (listing county powers); *see also* Salant, *County Governments: An Overview* at 8. As this Court has noted, one of the main powers of Alabama county governments "is to supervise and control the maintenance, repair, and construction of the county roads." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 493-94 (1992). Alabama county governments' other principal powers are largely limited to the erection of county courthouses, jails, and hospitals. *See* Ala. Code § 11-14-10. And as the court of appeals recognized, Alabama has not granted counties law enforcement authority. *See* Pet. App. 6a-18a. The court of appeals' holding that Monroe County was not suable under § 1983 for the sheriff's "policymaking" was therefore correct as a matter of statutory construction.

2. In rejecting the court of appeals' holding that the County cannot be held liable for the Sheriff's activities because it does not have law enforcement authority, neither petitioner nor his *amici* make any attempt to reconcile their expansive view of local government liability with § 1983's text, the common understanding of its meaning, or its legislative history. Instead, petitioner and the United States rely on dictum in *Pembaur* to argue that "when a sheriff is elected, funded and equipped by the county, with jurisdiction limited to the county, the sheriff is the county's final policymaker in the area of law enforcement." Pet. Br. 6; *see also* U.S. Br. 10. Petitioner asserts that "there is nothing of relevance to distinguish the Alabama sheriff in this case from the Ohio sheriff in *Pembaur*." Pet. Br. 10; *see also* U.S. Br. at 10 (asserting that *Pembaur* "approved of the court of appeals' conclusion that, under . . . a statutory scheme strikingly similar to the facts in the instant case," Ohio sheriffs made county law enforcement policy).

In *Pembaur*, however, the Court did not grant review on the question of whether Ohio sheriffs are county policymakers for law enforcement purposes. *See* 475 U.S. at 471, 476. Instead, the Court relied on the holding of the Sixth Circuit that, under Ohio law, the sheriff was the county's policymaker with respect to law enforcement activities, stating that this is "a conclusion that we do not question here." *Id.* at 484. *Pembaur* thus stands only for the discrete proposition that a single decision or act by an official vested with the authority to make local government policy could establish the existence of a policy. *See* 475 U.S. at 480-81.

Ironically, petitioner and his *amici* rely on *Pembaur*, yet ignore the Court's declaration in that case that it "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals." 475 U.S. at 484 n.13. Two separate panels of the Eleventh Circuit have now studied Alabama law and each has unanimously concluded that Alabama's counties have not been granted law enforcement authority and Alabama's sheriffs do not exercise county authority when they engage in law enforcement activity. *See* Pet. App. 10a-19a; *see also Swint v. City of Wadley*, 5 F.3d 1435, 1450-51 (11th Cir. 1993), *vacated on other grounds, Swint v. Chambers County Comm'n*, 115 S.Ct. 1203, 1212 (1995). As the Court indicated in *Pembaur*, these holdings are entitled to deference.

B. In the Absence Of A Grant By The State Of Law Enforcement Authority To The County, A Sheriff Does Not Make County Policy When Enforcing State Law

Petitioner further argues that the sheriff "is commonly understood to be a county official" and that "Alabama law expresses the common understanding that the sheriff is a county-based official setting policy for the county."

Pet. Br. 20-21. Noting the derivation of the term sheriff from the Saxon words "scyre" (as in shire or county) and "reve" (for keeper), petitioner further asserts that "[t]reatises and books regarding law enforcement uniformly recognize the position of sheriff in the United States as a position with county authority." *Id.* at 20.

The authorities petitioner relies on, however, do not establish anything more than that sheriffs exercise their powers within the boundaries of a county. *See id. at* 20-21 & n.4 ("sheriff" is the "chief law enforcement officer . . . in a U.S. county") (quoting American Heritage Dictionary at 1663 (3d ed. 1992)). But this truism certainly does not answer the question of whose authority the sheriff exercises in enforcing state law. Moreover, it is impossible to reconcile petitioner's assertion that sheriffs have traditionally exercised county authority (and therefore make county policy) with the Forty-Second Congress' rejection of the Sherman Amendment on the grounds that many units of local government had not been granted authority to keep the peace. *See Monell*, 436 U.S. at 673-81; *see also supra* pp. 10-13. Indeed, it is telling that petitioner notes the Saxon derivation of the term "sheriff," while ignoring more than one thousand years of understanding that the sheriff, as conservator of the peace, exercises the sovereign's and not the county's authority. *See* 1 William Blackstone, *Commentaries on the Laws of England* 339 (George Sharswood ed. 1904); Michael Dalton, *The Office And Authoritie Of Sherifs*, folios 2-3 (photo. reprint 1985) (1623).

The office of the sheriff was among those English institutions which the American colonists adopted in settling this country. *See* C.R. Wigan & Dougall Meston, *Mather On Sheriff And Execution Law* 15 (3d ed. 1935). Thus, the office was well established at the time of § 1983's enactment. *See, e.g.*, Cong. Globe at 795 (Statement of Rep. Burchard); 2 *Bouvier's Law Dictionary* 518 (1868); John G. Crocker, *The Duties Of Sheriffs, Coroners And Constables* § 1, at 1 note a (2d ed. 1871) (compiling state laws regarding the election, qualification and entering upon duty of sheriffs). It was likewise common parlance then to describe the sheriff as "a conservator of the peace within his county," Crocker, *The Duties of Sheriffs* § 25, at 18, or as "the chief executive officer of the county." Charles W. Hartshorn, *The New England Sheriff* 13 (2d ed. 1855).[8]

Sheriffs were thus required to carry out the very obligation which the Sherman Amendment would have imposed on local governments. *See* Crocker, *The Duties of Sheriffs* § 25, at 18; Perley, *The Maine Civil Officer* at 51-53; James Ewing, *A Treatise On The Office and Duty Of A Justice Of The Peace, Sheriff, Coroner, Constable, And Of Executors, Administrators, And Guardians* 538 (3d ed. 1839); Hartshorn, *The New England Sheriff* at 239-42; *The Conductor Generalis* at 377. Moreover, in performing the duty to preserve the peace, the sheriff was authorized by both statutory and common law to invoke the *posse comitatus*, that is, to require the adult citizens of the county to assist in the suppression of riots and the apprehension of criminals. 1 Anderson, *A Treatise On The Law Of Sheriffs* § 141, at 137-39, § 143, at 139; Charles R. Morrison, *Justice And Sheriff* 430 (1872); *The Conductor Generalis* at 377; Perley, *The Maine Civil Officer* at 52-53; Hartshorn, *The New England Sheriff* at

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[8] *See also* 2 *Bouvier's Law Dictionary* at 518; Edward R. Olcott & Henry M. Spofford, *The Louisiana Magistrate, And Parish Officer's Guide* 208 (1848); Jeremiah Perley, *The Maine Civil Officer* iii-iv (1825); *The Conductor Generalis: Or, The Office, Duty And Authority Of Justices Of The Peace, High-Sheriffs, Under-Sheriffs, Coroners, Constables, Gaolers, Jury-Men, And Overseers Of The Poor* 377 (1801).

That sheriffs are frequently termed "county officers" does not alter the source of the authority they exercise. As one of the authorities cited by petitioner notes, "[a]s a general rule, the sheriff answers to the attorney general for his activities even though the constitutions and statutes list him as a county officer with his compensation provided by the governing body in the particular county." George T. Felkenes, *The Criminal Justice System: Its Functions And Personnel* 55 (1973).

239-42; Blackstone, 1 *Commentaries On The Laws Of England* at 343.

Notwithstanding the duties and extraordinary powers of the sheriff's office, the members of the Forty-Second Congress rejected the Sherman Amendment on the ground that it imposed on local governments the obligation to keep the peace *when they had no such authority under state law*. *See supra* at 10-13. The only plausible explanation for this is that, at least when enforcing state law, the sheriff exercised the authority of the sovereign itself and not the county. Contrary to petitioner, this was, and remains, the common understanding of the source of the sheriff's authority. *See* 1 Anderson, *A Treatise On The Law of Sheriffs* § 6, at 5 ("In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State."); Cooley, *Handbook Of The Law Of Municipal Corporations* § 170, at 512 ("Sheriffs . . . and other so-called county officers are properly state officers for the county. Their functions and duties pertain chiefly to the affairs of state in the county[.]"); 2 *Bouvier's Law Dictionary* at 518 (defining sheriff as "[a] county officer representing the executive or administrative power of the state within his county").[9]

Sheriffs were commonly constitutional officers of the State, *see, e.g.*, Crocker, *The Duties Of Sheriffs* § 1, at 1 & n.1; La. Const. art. 83 (1845) (reproduced in Olcott & Spofford, *The Louisiana Magistrate* at 310); Hartshorn, *The New England Sheriff* at 14; Ewing, *Office And Duty*

[9] The understanding in this country that sheriffs exercise state authority is simply a continuation of the common law understanding. Blackstone described the sheriff as "do[ing] all the king's business in the county," 1 *Commentaries On The Laws Of England* at 339, and noted that "[a]s the keeper of the king's peace," the sheriff "may apprehend, and commit to prison, all persons who break the peace . . . and may bind any one in recognizance to keep the king's peace" and is "to defend his county against any of the king's enemies." *Id.* at 343 (footnote omitted).

at 513; Perley, *The Maine Civil Officer* § 1, at 2, and remain so in several States today. *See, e.g.*, Ala. Const. art. V, § 112; La. Const. art. V, § 27; Md. Const. art. IV, § 44; *Rucker v. Harford County*, 558 A.2d 399, 401-02 (Md. 1989). Before entering upon the duties of the office, the sheriff was commonly required to enter into a surety bond with the State "for the faithful execution of [the] office." Ewing, *Office And Duty* at 514; *see also* 2 Anderson, *A Treatise On The Law Of Sheriffs* at 709; Crocker, *The Duties of Sheriffs* at 503; Hartshorn, *The New England Sheriff* at 15; Perley, *The Maine Civil Officer* at 3. Sheriffs were also commonly subject to removal from office through either the State's impeachment procedure or removal by the governor, or both. *See* Crocker, *The Duties of Sheriffs* § 10, at 8-9; Hartshorn, *The New England Sheriff* at 7; La. Const. art. 88 (1845) (reproduced in Olcott & Spofford, *The Louisiana Magistrate* at 311); Perley, *The Maine Civil Officer* at 7; Ala. Const. art. VII, §§ 173-74; 2 *Bouvier's Law Dictionary* at 518.

As the foregoing demonstrates, sheriffs traditionally have been viewed as being state officers who exercise the State's sovereign authority. This was likewise the understanding of the Forty-Second Congress. It remains the case in Alabama. There sheriffs are constitutional officers of the State's executive department, *see* Ala. Const. art. V, § 112, who are required to investigate violations of law "whenever directed to do so . . . by the attorney general or governor," Ala. Code § 36-22-5, and must submit written reports "under oath . . . on any subject, relating to the duties of their . . . offices," when required by the Governor. Ala. Const. art. V, § 121.

Moreover, under the Alabama Constitution, sheriffs are subject to impeachment for the same offenses (including the willful neglect of their duties) as are other state officials such as the Governor and Attorney General, and are categorized with the State's judges for purposes of im-

peachment.[10] *See id.* § 112; art. VII, §§ 173-74. Consistent with the view that Alabama sheriffs exercise state authority, the Governor has been empowered to initiate an impeachment proceeding against the sheriff which is prosecuted by the Attorney General and heard by the state Supreme Court.[11] *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987). Alabama's sheriffs thus are at all times ac-

[10] Art. VII, § 174 of the Alabama Constitution provides:

> The chancellors, judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs, may be removed from office for any of the causes specified in the preceding section or elsewhere in this Constitution, by the supreme court, under such regulations as may be prescribed by law.

Impeachment of county officials is dealt with separately, and by different procedures. *See id.* at § 175. The assertion of *amicus* ACLU that the "manner of impeachment for sheriffs is the same as for virtually every county official," Br. *Am. Cur.* at 11, is thus erroneous. The ACLU's further assertion that sheriffs may not be impeached for "adopting law enforcement policies other than those preferred by the Governor or other state officials," *id.*, is unsupported by any decisional law. The ACLU does not explain why a sheriff, as a subordinate officer in the State's executive branch, who failed to follow orders from the Governor or Attorney General to conduct law enforcement activities in a particular manner, would not have engaged in the "[w]illful neglect of duty." Ala. Code § 36-11-1(b). *See State v. Jinwright*, 55 So. 541, 541-42 (Ala. 1911) (impeaching sheriff for neglect of duty, noting his failure to execute "[t]he Governor['s] . . . positive orders to place a guard at the jail and protect the prisoner at all hazards").

[11] Impeachment proceedings have been invoked on numerous occasions. There are five reported instances in which the State has sought to impeach sheriffs. *See State v. McPeters*, 56 So.2d 102 (Ala. 1951); *State v. Baggett*, 41 So.2d 584 (Ala. 1949); *State v. Jinwright*, 55 So. 541 (Ala. 1911); *State v. Latham*, 61 So. 351 (Ala. 1910); *State v. Cazalas*, 50 So. 296 (Ala. 1909). These decisions do not represent the total number of impeachment proceedings because the Alabama Supreme Court stopped issuing opinions in these cases more than forty years ago. *See McPeters*, 56 So.2d at 103-04. Nor do they account for those instances in which sheriffs

countable to state authority. This stands in stark contrast to the procedure used for the removal of county officers, such as members of the board of commissioners and other local officials, which provides for a jury trial in various "court[s] of the county in which such officers hold their office," Ala. Const. art. VII, § 175, and effectively vests removal authority in the local populace.

None of the factors which petitioner and his *amici* rely upon to argue that the sheriff exercises county authority, *e.g.*, the method of selection, funding, or jurisdiction of the office, alters the fact that Alabama's sheriffs are constitutional officers of the State who, in enforcing state law, exercise state authority. Contrary to the assertion that because sheriffs are elected by the residents of a county they exercise county authority, *see* Pet. Br. 20; U.S. Br. 17, the selection of the sheriff through popular elections does not alter the nature of the office's authority. At the time of § 1983's enactment, it was "the usual practice . . . for the people of the several counties to elect sheriffs at regular intervals." 2 *Bouvier's Law Dictionary* at 518. *See also* Crocker, *The Duty Of Sheriffs* § 1, at 1; Ewing, *Office And Duty* at 513; Olcott & Spofford, *The Louisiana Magistrate* at 208; *see also* Cong. Globe at 795 (Rep. Burchard). But as the members of the Forty-Second Congress recognized, sheriffs did not exercise the authority of their counties but rather that of their States.[12]

have resigned their offices when threatened with impeachment proceedings or criminal indictment.

While the United States grudgingly acknowledges that Alabama sheriffs are impeached "at the state level," it makes the unpersuasive suggestion that "the county's power to vote its sheriff out of office is a more realistic measure of control." U.S. Br. at 18 n.8. Unlike an election which occurs only at four year intervals, *see* Ala. Const. art. V., § 138, an impeachment can be initiated at any time. Impeachment proceedings are rarely initiated against federal officials. Impeachment nonetheless remains a "realistic" and effective control against malfeasance by federal officials.

[12] In many States, judges are elected by the voters of districts whose boundaries are coterminous with county lines. *See, e.g.*, Ariz. Rev. Stat. § 12-120.02 (court of appeals); Ga. Code Ann.

Petitioner's position is also refuted by the Alabama Constitution's empowerment of the Governor to require sheriffs to provide "information in writing, under oath, . . . on any subject, relating to the duties of their respective offices," and making the failure to do so, or willful filing of a false report, an impeachable offense. Ala. Const. art. V, § 121. It is further refuted by statutes requiring the sheriff to conduct special investigations when directed by the Governor or Attorney General, *see* Ala. Code § 36-22-5, and requiring sheriffs to follow the direction of the Governor upon issuance of a writ of special election. *See id.* § 17-18-3. Alabama law thus conclusively demonstrates that sheriffs are state officers who exercise the authority of the State itself and not the county.

Petitioner and the United States also place much stock in provisions of Alabama law which require that counties pay the salary and expenses of the sheriff. *See* Pet. Br. 9-10, 15-16, 18; Br. *Am. Cur.* U.S. 15-17. But the fact that Alabama, as an administrative matter, imposes on its counties these "duties and responsibilities in regard to law enforcement by the county sheriff," U.S. Br. 15, does not establish that the State has granted its counties law enforcement authority. Rather, this argument erroneously equates the county's funding obligations with a grant of law enforcement authority. It ignores that sheriffs' salaries are set by state law, *see* Ala. Code § 36-22-16(a), a provision which is inconsistent with the notion that counties exercise law enforcement authority.[13] It also ignores

§§ 15-6-1; 15-7-20 (trial courts); Kan. Stat. Ann. § 20-301 (trial courts); Mont. Code Ann. § 3-5-201 (trial courts); 42 Pa. Cons. Stat. §§ 901, 3131 (court of common pleas). These judges no more exercise county authority by virtue of their election by county residents than do sheriffs.

[13] The United States erroneously asserts that Ala. Code § 36-22-16(a) "makes clear that the county . . . has the authority to provide a higher salary 'by law by general or local act.'" U.S. Br. at 16 (quoting Ala. Code § 36-22-16(a)). The terms "general or local act" do not, however, refer to county ordinances but rather categories of legislation enacted at the state level. *See* Ala. Const. art. IV, § 110 ("a general law . . . is a law which applies to the whole

that a sheriff can sue the county commission if it does not provide adequate funds for his office and activities. *See Etowah County Comm'n v. Hayes,* 569 So.2d 397 (Ala. 1990).[14]

Petitioner's argument that the county's funding obligations equate with a grant of authority to the county proves too much because the States, including Alabama, have long vested in their sheriffs numerous duties, many of which unquestionably involve the exercise of state authority. As one leading treatise explains:

> [I]t is his duty, when required, to execute all criminal process, judgments and orders of every court or officer having criminal jurisdiction in this state. . . . He is also required to serve the subpoenas of district attorneys of other counties, upon witnesses in his own county . . . .
>
> In civil matters, the sheriff is the immediate officer of every court of record in the state . . . to whom all writs and process are regularly directed, and he is bound to execute the same. He is to serve the writ or order for arrest, and take bail, summon the jury, and through him the court enforces obedience to its orders and punishes for contempts; and when

state; a local law is a law which applies to any political subdivision or subdivisions of the state less than the whole"). Moreover, the Alabama legislature is constitutionally prohibited from granting a county authority to "increase or decrease the fees and compensation of [public] officers during their terms of office." *Id.* § 68.

[14] The source of the office's funding is not probative of the source of the sheriff's authority. Sheriffs traditionally were funded not by the sovereign but by county residents through the imposition of fees and taxes. 2 Anderson, *A Treatise On The Law Of Sheriffs* § 706, at 673; *see also* George Atkinson, *A Treatise On The Offices Of High Sheriff, Undersheriff, Bailiff* 267 (6th ed. 1878); Morrison, *Justice And Sheriff* at 371; Perley, *The Maine Civil Officer* at 69-74.

Notwithstanding that the sheriff's office was funded by residents of the county, the sheriff clearly exercised the authority of the sovereign. *See* 1 Blackstone, *Commentaries On The Laws Of England* at 339, 343-44.

> a cause is determined, he sees that the judgment of the court is carried into effect. He may hold courts to execute writs of inquiry, and such special writs as may be directed to him, pursuant to any statute, and to inquire into any claim of property seized or levied on by him . . . .

Crocker, *The Duties Of Sheriffs* §§ 25-26, at 18-19; *see also* Olcott & Spofford, *The Louisiana Magistrate* at 215-51; Hartshorn, *The New England Sheriff* at 18-24, 36-277; Ewing, *Office and Duty* at 519-42; Perley, *The Maine Civil Officer* at 25-68.

In Alabama, the sheriff's duties are equally broad in scope. Thus, in addition to "ferret[ing] out crime," Ala. Code § 36-22-3(4), the sheriff must "execute and return the process and orders of the courts of record of th[e] state and of officers of competent authority . . . ." *Id.* § 36-22-3(1). The sheriff is also required to attend the various courts "held in [the] county" and "obey the lawful orders and directions of such courts." *Id.* § 36-22-3(2). If petitioner is correct in his assertion that the county's funding of the office of the sheriff establishes that the county has law enforcement authority, then it likewise establishes that the county exercises authority with respect to the execution and return of the process issued by the State's courts, its agencies and officials, or in the carrying out of other judicial orders.

But it can hardly be the case that a sheriff makes county policy when he unconstitutionally enforces an injunction or writ of attachment in a civil matter between private parties. Nor can it be the case that a sheriff makes county policy when he unconstitutionally serves a subpoena issued by a state agency or legislature. The county, being an artificial person with only those powers granted to it by the State, *Fertilizing Co.*, 97 U.S. at 666-67; *Railroad Co.*, 79 U.S. (12 Wall.) at 81; Dillon, *The Law Of Municipal Corporations* § 9, at 29, has no authority over such matters, *see* Ala. Code § 11-2-11, and cannot reasonably be viewed as having any policy with respect thereto.

Likewise, under Alabama law, law enforcement is simply not within a county's authority. That the State assigns its sheriffs a jurisdictional boundary on the basis of county lines as a matter of tradition and administrative convenience is of no relevance in determining whether the corporate entity of the county exercises law enforcement authority.[15]

There is thus no merit to the contention that Alabama's sheriffs make county policy because "their decisions are final and unreviewable" within their counties. Pet. Br. 10; U.S. Br. 13. That Monroe County's board of commissioners or its other officials do not have the authority to review the decisions of the sheriff does not prove that the latter makes county policy. To the contrary, the absence of such authority is entirely consistent with the State's related decisions not to grant counties law en-

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[15] Petitioner and his *amicus* ACLU also point to the existence of the Alabama Highway Patrol to suggest that sheriffs must exercise county authority. Pet. Br. 24; *see also* Br. *Am. Cur.* ACLU 8 (arguing that "Alabama . . . clearly differentiates between state law enforcement authority, which is exercised by the State Highway Patrol, and county law enforcement authority, which is exercised by county sheriffs").

The suggestion that the existence of the state police renders the sheriff a county policymaker (who exercises county authority) is, however, a non sequitur and is refuted by more than one thousand years of understanding that the sheriff, as conservator of the peace, exercises the sovereign's authority. *See supra* pp. 18-20. Consistent with this understanding, Alabama has made its sheriffs constitutional officers of the State's executive department subject to impeachment at the initiation of the Governor and Attorney General.

The comparatively recent creation of state police forces (a post-World War I development) does not alter this understanding. That the advent of the automobile and its attendant problems, *i.e.*, traffic safety and theft, and the ease with which criminals could cross jurisdictional boundaries, *see* John A. Humphrey & Michael E. Milakovich, *The Administration Of Justice: Law Enforcement, Courts, and Corrections* 42 (1981), led States such as Alabama to establish state police forces, does not alter the source of the sheriff's authority. The States are not prohibited from vesting law enforcement authority in more than one institution of state government.

forcement authority and to make sheriffs constitutional officers of the State's executive department. Sheriffs could hardly vindicate the State's sovereign interests if their activities were subject to review by local officials.

It is simply erroneous to suggest, as the United States does, that the sheriff acts with "county power" because "state law identifies no other official or entity as authorized to make final policymaking decisions over law enforcement in a particular county" or that no "official with statewide jurisdiction supervise[s] the sheriff in the exercise of his law enforcement authority." U.S. Br. at 12-13. The relevance of these factors in determining whether an official acts with state or county authority is not immediately clear. Indeed, officials such as the Governor and Attorney General (and many federal officials) are ordinarily subject to "supervision" only through such mechanisms as legislative oversight and impeachment.

In any event, the Alabama Constitution gives the Governor and Attorney General the power to supervise and discipline errant sheriffs through their authority to institute impeachment proceedings and require sworn written reports on their activities. *See supra* pp. 21-23. Likewise, the Alabama Constitution vests "[t]he supreme executive power of th[e] state" in the Governor, Ala. Const. art. V, § 113, and necessarily grants the Governor authority over subordinate officers such as sheriffs. *See id.* § 112. Indeed, in *State v. Jinwright*, the Alabama Supreme Court impeached a sheriff for failing to prevent a lynching, in part because "[t]he Governor had given him positive orders to place a guard at the jail and protect the prisoner at all hazards." 55 So. at 541. It is thus strange to suggest that a sheriff, as a subordinate officer, who failed to obey the Governor's lawful orders would not risk impeachment for the willful neglect of duty.

Finally, petitioner's suggestion that "if states could insulate their counties from liability simply by designating sheriffs and others who operate on the local level as 'state officials,' § 1983 would certainly and easily be

thwarted," Pet. Br. 26, *see also* Br. *Am. Cur.* ACLU at 14, is mistaken for several reasons. First, Alabama has done far more than label its sheriffs as state officials. Rather, as discussed above, it has made them accountable to the State by subjecting them to an impeachment procedure initiated by the Governor and Attorney General and adjudicated by the state Supreme Court, as well as through other mechanisms.

Second, Alabama has not made its sheriffs state officials in order to insulate counties from § 1983 liability. As the Alabama Supreme Court's opinion in *Parker* explains, the State's constitutional provisions which made sheriffs executive officers of the State and subjected them to impeachment were enacted in 1901, sixty years before this Court revived § 1983 in *Monroe* and nearly eighty years before *Monell* overruled *Monroe* with respect to the suability of local governments as "persons" under the statute. *See* 519 So.2d at 443-44. Indeed, the impeachment power was vested in the State itself—a change from the prior practice—for the very purpose of preventing egregious conduct which unquestionably violated constitutional norms. *See Jinwright*, 55 So. at 542 (impeaching sheriff and noting "[i]t is vain for us to write in our Constitution . . . that all persons accused of crime shall have the right to a 'public trial, by an impartial jury,' and shall not 'be deprived of life, liberty, or property, except by due process of law,' if our government cannot or will not enforce it").

Third, affirmance of the court of appeals' decision does not "thwart" the intent of the Forty-Second Congress or the purpose of § 1983. *See* Pet. Br. 13. To the contrary, as explained above, the Forty-Second Congress specifically rejected the imposition of liability on local governments where the States had not granted them authority to act. *See supra* pp. 10-13. Likewise, the Forty-Second Congress specifically rejected the imposition of liability on the States themselves. *See Will*, 491 U.S. at 71. Consistent with these principles, it rejected the imposition of

Sherman Amendment liability on county governments notwithstanding the existence of the sheriff's office because it recognized that in enforcing state law, sheriffs exercised state and not county authority. *See supra* 12-13. Petitioner's objection, then, is to the failure of the Forty-Second Congress to subject the States to suit under § 1983.

Finally, as a leading authority has noted, "states do not order their affairs with future federal litigation in mind, but with a practical appreciation for what seems workable and appropriate." Charles F. Abernathy, *Civil Rights And Constitutional Litigation* 349 (2d ed. 1992). Alabama has a long tradition of limited government and particularly limited county government. That it adheres to this tradition by granting its counties only limited powers and retaining law enforcement authority in the state executive branch is a choice which it is entitled to make. Adopting petitioner's expansive notion of liability is especially unjustifiable in light of the solicitude for the structure of state and county governments which the Forty-Second Congress showed in rejecting the Sherman Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 20, 1997